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March 2, 2016

Ms. Cynthia T. Brown  
Chief, Section of Administration  
Office of Proceedings  
Surface Transportation Board  
395 East Street SW  
Washington, DC 20423

Re: **STB Finance Docket No. 36004, Canadian Pacific Railway Limited — Petition for Expedited Declaratory Order**

Dear Ms. Brown:

Enclosed for filing in the above-referenced docket are the following:

- original and ten copies of the Petition for Expedited Declaratory Order of Canadian Pacific Railway Limited;
- three discs containing the enclosed filing; and
- a check in the amount of \$1,400, representing the filing fee.

Please note that in the interest of time, a copy of the executed Verified Statement of E. Hunter Harrison is included. The original signature page will be filed in due course.

If you have any questions, please contact me. Thank you.

Sincerely,

STINSON LEONARD STREET LLP

  
David F. Rifkind

**FEE RECEIVED**  
March 2, 2016  
SURFACE  
TRANSPORTATION BOARD

**FILED**  
March 2, 2016  
SURFACE  
TRANSPORTATION BOARD

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36004  
CANADIAN PACIFIC RAILWAY LIMITED

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PETITION FOR EXPEDITED DECLARATORY ORDER

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Dated: March 2, 2016

**EXPEDITED CONSIDERATION REQUESTED**

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36004

CANADIAN PACIFIC RAILWAY LIMITED

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**PETITION FOR EXPEDITED DECLARATORY ORDER**

Petitioner, Canadian Pacific Railway Limited ("CPRL"), respectfully petitions the Surface Transportation Board ("Board" or "STB") for an expedited declaratory order pursuant to the Board's discretionary authority under 5 U.S.C. § 554(e) and 49 U.S.C. § 721. CPRL is a non-carrier, publicly-traded holding company that wholly owns directly or indirectly rail carriers in Canada and the United States that do business as "CP" or "Canadian Pacific."<sup>1</sup> CPRL is pursuing a merger with Norfolk Southern Railway Company ("Norfolk Southern" or "NS"), which has refused CPRL's overtures based, in large part, on its assertion that the STB would not approve CPRL's proposed voting trust structure. This assertion appears to be intended to discourage stockholder support for a CPRL-NS meeting to discuss the benefits of a merger, and thus its mere presence shields NS's current management from their own stockholders by creating the impression that the regulatory process creates insurmountable obstacles to any transaction. A declaratory ruling from the Board providing guidance would remove such uncertainty, and thus

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<sup>1</sup> "Canadian Pacific" or "CP" refers to the Canadian Pacific Railway Company ("CPRC"), which is the Canadian operating company and parent of the United States railroad operating subsidiaries, Soo Line Railroad Company ("Soo"), Delaware and Hudson Railroad Company, and Dakota, Minnesota and Eastern Railroad Corporation. Soo is a Class I railroad. Because CPRC and its U.S. railroad subsidiaries operate as an integrated system, CPRL proposes to hold the voting securities of CPRC in the voting trust, which would have the effect of holding all of the CP rail carriers within the trust.

leave stockholders free to make decisions about the efficacy of further meetings based on the potential benefits of a merger, not on ersatz regulatory concerns.

CPRL requests that the Board issue a declaration on two issues:

1. that a structure in which CPRL holds its current rail carrier subsidiaries in an independent, irrevocable voting trust while it acquires control of NS and seeks STB merger authority potentially could be used to avoid the exercise of unlawful premature common control<sup>2</sup>; and
2. that it would be potentially permissible for the chief executive officer of CP to terminate his position at CP entities in trust and then to take the comparable position at NS pending merger approval.<sup>3</sup>

CPRL recognizes that, should the STB issue these declarations, CPRL would still have the burden to show in a future proceeding that the actual voting trust agreement and structure would not result in unlawful control and would be consistent with the public interest.

We request that the Board issue the declaration before NS's annual meeting to minimize regulatory interference in the stockholder vote on CP's resolution. Although NS has not yet announced the date of its annual meeting, it would, based on NS's past practice, normally occur in the second week of May.<sup>4</sup> Accordingly, CPRL requests that this petition be placed on an expedited track, set out below, to allow the Board sufficient time to render its ruling by May 6, 2016, or earlier if necessary.

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<sup>2</sup> The precise legal structure of the transaction, including whether CPRL or a new CP-NS holding company will acquire NS, is to be determined.

<sup>3</sup> It is possible that a small number of other CP executives would also terminate their positions at CP and assume comparable positions at NS. CPRL believes it would be premature to speculate as to whether and who might transfer with Mr. Harrison, as CPRL expects such issues to be addressed in negotiations with NS.

<sup>4</sup> NS's Notice of Annual Meeting included in its 2016 preliminary Proxy Statement (filed Feb. 29, 2016) states the date the annual meeting is "to be decided." CPRL will advise the Board of the actual date for the NS annual meeting as soon as NS announces it.

## BACKGROUND

Since November 2015, CPRL has made three proposals to NS to form a combined transcontinental railroad that would, among many benefits, open new markets to both railroads' customers utilizing efficient single line service, reduce costs, improve service, reduce fuel consumption and highway congestion, and strengthen the rail network by alleviating pressure on Chicago. Notwithstanding the sizeable premium offered, NS has rejected all of CPRL's offers, each time citing the supposed regulatory uncertainty as a principal reason not to pursue the transaction. CPRL first approached NS on November 9, 2015 when CP's Chief Executive Officer E. Hunter Harrison spoke to NS President and Chief Executive Officer James Squires, followed by a meeting between the two on November 13, 2015, and the release of a letter on November 17, 2015 which more formally detailed CPRL's proposal. On December 4, NS rejected CPRL's offer, citing "substantial regulatory risks and uncertainties that are highly unlikely to be overcome" including uncertainties regarding the voting trust structure. NS Press Release, December 4, 2015 attached as Exh. A. According to Squires,

There is a high probability that, after years of disruption and expense, the proposed combination would be rejected by the Surface Transportation Board ("STB"). We also believe the STB would reject Canadian Pacific's proposed voting trust structure, and that there is no certainty that any other voting trust structure would be approved. Even if the proposed combination were ultimately to be cleared, it would be subject to a wide range of onerous conditions that would reduce the value of the stock consideration that has been proposed.

*Id.*

Three days later in an effort to give NS's supposed regulatory uncertainty claim a patina of legitimacy as grounds for summarily rejecting CPRL's proposal, NS released its so-called "white paper" signed by former STB members Frank Mulvey and Chip Nottingham. NS "White Paper" "Regulatory Review of Proposed CP+NS Merger" (Dec. 7, 2015) attached as Exh. B. Based on incorrect factual assumptions and without citing legal authority, the white paper

asserted that the STB was unlikely to approve any voting trust that CPRL might propose, particularly a trust that involved a management swap.

CPRL sent a revised offer on December 7, 2015, that formally proposed closing the transaction into a voting trust as a means of reducing regulatory risk to NS's shareholders. The following morning, NS issued a statement rejecting the revised offer citing its belief that the STB would not approve the proposed voting trust structure. NS Press Release, December 8, 2015 attached as Exh. C. In a letter dated December 14, 2015, NS expounded on its views of the proposed voting trust structure:

With respect to the unprecedented voting trust structure included in your revised proposal ... Based on the advice of regulatory experts, including former STB commissioners, we believe it is highly unlikely that any voting trust structure would be approved in connection with the proposed transaction, and that the STB would view the unprecedented structure proposed by you to result in premature control being exercised over Norfolk Southern.

December 14, 2015 Letter from James Squires and Steven Leer to E. Hunter Harrison and Andrew F. Reardon attached as Exh. D.

On December 16, 2015, CPRL made a third offer which NS rejected. Notwithstanding CPRL's December 15, 2015 comprehensive and well-supported response to the NS white paper demonstrating that CPRL's proposed voting trust would fit comfortably within long-standing precedent and recent regulatory requirements for Class I mergers (CP Press Release, December 15, 2015 attached as Exh. E), NS continued to contend as a basis for rejecting CPRL's offer, its belief that the proposed voting trust structure would not be approved:

In addition, you have not addressed the significant regulatory issues that we have previously identified. We do not believe that your voting trust structure would be approved. As you know, our view reflects careful analysis by our regulatory experts and is fully supported by two former Surface Transportation Board ("STB") Commissioners. You have a path to seek a declaratory order from the STB as to whether the voting trust structure that you proposed could work. The STB has clear, statutorily-established authority to issue declaratory orders to remove uncertainty, and there is precedent for it in the voting trust context. No

involvement by Norfolk Southern is required for you to seek a declaratory order regarding the legality of putting Canadian Pacific into a voting trust under your proposed structure. Your decision not to seek an order shows a lack of confidence in your proposed structure.

December 23, 2015 Letter from James Squires and Steven Leer to E. Hunter Harrison and Andrew F. Reardon attached as Exh. F. NS went one step further to assert that absent a declaratory order, there was “no basis to meet” with CPRL to discuss a possible merger. *Id.* In light of NS management’s intransigence, CPRL has proposed a non-binding stockholder resolution, to be voted on at NS’s upcoming annual meeting, requesting the NS board to enter into good faith discussions with CPRL regarding a business combination transaction.<sup>5</sup>

Ironically, CPRL thought that proposing a voting trust here would reduce the risk that the market will not properly function due to the uncertainty related to the regulatory review process, which is why voting trusts are commonly used in rail and other regulated industry transactions that require prior regulatory approval for combinations.<sup>6</sup> The proposal to put the CP rail carriers, not NS, in trust avoids NS’s concern that it would be in “voting trust limbo for two years,” *infra* n. 7. It also addresses the concerns embodied in the 2001 rule change by enhancing the likelihood that NS will be a stronger railroad at the end of the approval process thereby reducing the risk of harm should the transaction be rejected and divestiture ordered, as well as by enhancing the prospects for a smoother integration if the merger is approved. But NS’s assertions

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<sup>5</sup> NS’s 2016 preliminary Proxy Statement (at 61) reiterates NS’s view that CPRL’s proposal “would face substantial regulatory risk and uncertainties that would be highly likely to be overcome” as a reason to oppose CPRL’s resolution.

<sup>6</sup> Voting trusts have been used to avoid control violations in telecommunications, motor carrier, and aviation transactions. *E.g., In Re Tender Offers and Proxy Contests*, 59 Rad.Reg. 2d (P&F) 1536, 1986 WL 291498 (FCC March 17, 1986)(recognizing use of voting trust in broadcast transactions); *B.F. Goodrich Co. v. Northwest Industries, Inc.*, 303 F. Supp. 53 (D. Del. 1969)(motor carriers); *Trans World Airlines, Inc. v. CAB*, 339 F.2d 56 (2d Cir. 1964)(aviation).

to the contrary have created a situation where the market cannot function properly, thus requiring the need to file this Petition.

An independent voting trust has long been recognized as an effective means of separating ownership from the ability to exercise control over a company. In the rail industry, the need for voting trusts stems from the statutory requirement for STB approval of any transaction that results in common control of rail carriers. 49 U.S.C. § 11323(a). STB approval before common control<sup>7</sup> is acquired fulfills the statutory policy of “ensur[ing] the development and continuation of a sound rail transportation system with effective competition among rail carriers and with other modes.” 49 U.S.C. § 10101(4); *see, e.g., Union Pacific Corp., et al. – Control—Missouri Pacific Corp., et al.*, 366 ICC 462, 484 (1982)(statutory policy “emphasizes the importance of the relationship between ensuring adequacy of transportation and retention of competition”). And, it furthers the longstanding statutory policy favoring rail consolidation. *Union RR Co. v. United Steelworkers of America*, 242 F.3d 458, 463 (3<sup>rd</sup> Cir. 2001)(“The ICA, on the other hand, gives substance to what has been, since the adoption of the Transportation Act of 1920, the nation’s policy of pursuing railroad carrier consolidation as a means of promoting the health and efficiency of the railroad industry”)(citations omitted).

Because the regulatory approval process can take months, or even years, waiting for regulatory approval before closing the transaction would significantly deter rail mergers and would put rail bidders at substantial disadvantage vis-a-vis non-rail bidders seeking to acquire control of a rail carrier. Such deterrence would be at odds with statutory and regulatory policies that favor rail consolidation, minimal regulatory interference in the marketplace, and neutrality in

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<sup>7</sup> “Control” is defined expansively, 49 U.S.C. § 10102(3), which has been interpreted “to encompass every type of control in fact” with the factual decision as to whether control exists “left to the agency charged with enforcement.” *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 125 (1962).

tender offers and takeover contests. Accordingly, to facilitate rail transactions, the Board (and previously the Interstate Commerce Commission (“ICC”)) has allowed parties to use independent voting trusts in hundreds of transactions. *See, e.g., Water Transport Ass’n v. ICC*, 715 F.2d 581, 582 (D.C. Cir. 1983) (“Because of this long delay, merging carriers often have an economic incentive to complete the transaction first and seek ICC approval later. The ICC has long permitted carriers to do this by use of an independent voting trust”).

The Board’s policy regarding voting trusts has evolved from dealing with them largely on an after-the-fact, *ad hoc* basis to adopting guidelines governing their provisions to, for Class I railroads, establishing procedures for prior approval. *See Voting Trust Rules*, 44 Fed. Reg. 59908, 59909 (Oct. 17, 1979) (noting the ICC “encountered a number of instances involving improper use of voting trusts” and “adopting guidelines governing the provisions of voting trust agreements”); 49 C.F.R. § 1180.4(b)(4)(iv)(2015)(procedure for proposing use of a voting trust in major transactions). This evolution now requires that “applicants in major rail consolidations . . . demonstrate in a public filing that their contemplated use of a trust would not result in unlawful control and would be consistent with the public interest.” *Major Rail Consolidation Procedures*, 5 STB 539, 567 (2001). Although these new procedures were adopted in 2001, no application proposing the use of a voting trust in a merger involving Class I railroads has yet been submitted to the Board.

#### **A DECLARATORY ORDER WOULD BE APPROPRIATE**

The Board has discretionary power to issue declaratory orders to eliminate controversy or to remove uncertainty. 5 U.S.C. § 554(e) and 49 U.S.C. § 721. In the instant situation, NS has raised the specter of uncertainty regarding the use of a voting trust relying, in part, on the fact that the Board has yet to rule on a voting trust application under the new merger procedures. In

addition, this petition raises the atypical question of whether CPRL's ownership of voting securities in the CP carriers can be held in trust, while CPRL acquires NS and seeks STB approval of a CP-NS merger. This petition also requests a ruling on another matter that the Board has not directly decided: can NS hire CP's former CEO, while CP is held in a voting trust. This petition seeks clarification from the Board that the proposed voting trust structure would not constitute unlawful control and that any legitimate concerns regarding unlawful control by the former CP executive's hiring could be addressed adequately through conditions on compensation and conduct, and through the STB's ongoing oversight and enforcement authority.

For CPRL stockholders and NS stockholders, both of whom would, upon the closing of the transaction, become stockholders of the new CPRL-NS company, the proposed voting trust structure offers an opportunity to significantly reduce regulatory risk. The transaction could close quickly at which point NS stockholders would receive the cash portion of the consideration. Additionally, since the NS stockholders would also receive equity in the combined company, the proposed structure could protect and enhance stockholders' investment in NS during regulatory review by facilitating the full scale adoption and implementation of the highly successful "precision railroading model."<sup>8</sup> Mr. Harrison used this model successfully at Illinois Central ("IC"), at Canadian National ("CN"), and at CP to transform each railroad from industry laggard to industry leader. Having the proposed voting trust structure in place during the regulatory approval process would allow Mr. Harrison to apply the precision railroading model at NS with the expectation of significantly increasing the likelihood that NS will be a more efficient and

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<sup>8</sup> Precision railroading is a scheduled railroad model that, at its core, focuses on improving customer service and asset utilization, controlling costs, increasing safety and valuing and rewarding employees. *See* Verified Statement of E. Hunter Harrison (Harrison V.S.) at 3. It is not railroad specific and does not constitute a "business plan" as some have suggested. In fact, most railroads have adopted some aspects of precision railroading, but none have done so as effectively as those that adopted it under Mr. Harrison's direction.

more valuable asset regardless of the regulatory outcome.<sup>9</sup> In the meantime, the CP rail carriers held in trust would continue to be led by CP's current President and Chief Operating Officer, Keith Creel together with many of the key managers that have overseen CP's dramatic transformation since 2012.<sup>10</sup> This continuity provides stockholders comfort that CP will continue on its trajectory and continue to be an industry leader in service, efficiency, asset utilization, cost control, and safety.

Stockholders of both CPRL and NS have indicated that the uncertainty about the voting trust structure could influence their perception of the value of going forward with a merger. As CPRL has proposed a stockholder resolution for vote at NS's annual meeting, removing this uncertainty before the meeting occurs would allow a vote based on the merits of going forward, rather than one that is clouded by regulatory process questions. Accordingly, the Board may appropriately exercise its discretion to resolve the uncertainty by issuing the requested declaratory order.<sup>11</sup>

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<sup>9</sup> For purposes of this petition, the Board need not determine whether the adoption of "precision railroading" would be considered a public interest benefit. For this declaratory petition, the only concern should be removing alleged regulatory uncertainty that hampers stockholders' ability to vote on CPRL's resolution urging NS to engage in good faith discussion with CP regarding a business transaction combination, based on whether a combination makes sense from a market standpoint.

<sup>10</sup> Those managers would sever their ties with CPRL.

<sup>11</sup> This holds true whether or not the Board considers this matter to involve an "actual controversy" as that term is used to limit federal court jurisdiction under Article III of the Constitution. "The subject matter of agencies' jurisdiction naturally is not confined to cases or controversies inasmuch as agencies are creatures of article I. . . . [A]gencies are generally free to act in advisory or legislative capacities. While this is obvious in the case of rulemaking, it is also true where an agency proceeds via traditional adjudicatory forms of decision. Thus the Commission correctly observes that an agency may, if authorized by statute, issue an advisory opinion or abstract declaration without regard to the existence of an actual controversy." *Tennessee Gas Pipeline Co. v. FPC*, 606 F.2d 1373, 1380 (D.C.Cir. 1979). Clearly, 5 U.S.C. § 554(e) authorizes the Board to issue such declarations.

## GOOD CAUSE EXISTS FOR AN EXPEDITED DECISION

NS's management has proffered the alleged uncertainty about the regulatory process as a ground for not discussing, much less considering, whether a merger agreement between CP and NS can be reached and what benefits it might bring to the public, to the companies' stockholders, and to other constituencies. *See* NS White Paper, Exh. B (contending that "the STB is not likely to approve CP's proposed voting trust").<sup>12</sup> In an effort to bring attention back to the central question of whether a CPRL-NS merger makes sense from a market standpoint, CPRL has proposed a stockholder resolution for vote at NS's upcoming annual meeting requesting that the NS board engage in good faith discussions with CPRL regarding a business combination transaction. Stockholders from both companies have informed CPRL that they are supportive of CPRL's efforts, but some have expressed reservations based on NS's claims that the proposed voting trust structure could not be approved. Harrison V.S. at 1.

Employing regulatory uncertainty as a weapon to protect existing management from a potential merger contravenes the federal "policy of neutrality in contests for control." *Piper v. Chris-Craft Industries, Inc.*, 430 U.S. 1, 29 (1977); *see Rondeau v. Mosinee Paper Corp.*, 422 U.S. 49, 58-59 (1975)(noting policy aims "to avoid tipping the balance of regulation either in favor of management or in favor of the person making the takeover bid") (internal quotation marks and citations omitted); *see Schreiber v. Burlington Northern, Inc.*, 472 U.S. 1, 9 (1984) (noting congressional intent "was to preserve a neutral setting in which the contenders could fully present their arguments"). This policy of evenhandedness in contests for control of an entity has been followed by other agencies that have approved the use of voting trusts in such

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<sup>12</sup> Aside from our disagreement with Mulvey and Nottingham's contention, it is founded on the faulty premise that CP proposes to put NS in trust. *See id.* (asserting "[i]t is far easier to identify the public interest harms from holding NS in voting trust limbo for two years"). As Mr. Harrison explains in his verified statement, CPRL proposes that CP rail carriers, not NS, be held in trust.

situations. See *In Re Tender Offers and Proxy Contests*, *supra*, 1986 WL 291498, at ¶¶ 75 – 76 (approving use of independent voting trusts in order to address concerns that FCC's existing regulatory approval procedures "would result in protracted delays, effectively insulate incumbent management from takeover challenges, and conflict with the objective of governmental neutrality set forth in the Williams Act and our policies [and that] the regulatory delays arising from this procedure in effect deprive shareholders of communications corporations of the ability to consider tender offers"). Consistent with these principles, allowing voting trusts in regulated transactions eliminates, or at least reduces, the impact of regulatory interference in such circumstances. NS's existing management is attempting to tip the balance in its favor by claiming regulatory uncertainty. STB action can restore the balance by resolving the regulatory uncertainty, which action would be consistent with the point "that Congress intended for investors to be free to make their own decisions." *Edgar v. Mite Corp.*, 457 U.S. 624, 639 (1982).

NS's stockholders can be free to make their own decisions, however, only if the Board removes the claimed uncertainty by acting on the instant Petition prior to NS's upcoming annual meeting. To accomplish that, CPRL proposes that the Board set a 20-day period for comments, which is the same time allowed for answers to complaints (49 C.F.R. § 1111.4(c)), with a five (5) day period for CPRL's reply to comments. This schedule should give the Board sufficient amount of time prior to NS's upcoming annual meeting to consider the matter and to issue a decision. Establishing this schedule for comments and decision is warranted because a decision after the NS's annual meeting could significantly impair the NS stockholders' right to make their own decisions on going forward with merger discussions as well as CPRL's right not to have the regulatory process be used to protect NS's existing management.

## ARGUMENT

### I. DECLARATORY RELIEF REGARDING WHICH RAILROAD'S VOTING SECURITIES CAN BE PLACED IN TRUST IS APPROPRIATE

#### A. What This Petition Does *Not* Address

The instant petition asks the Board a very narrow voting trust legal question: would a potentially permissible way to avoid unlawful control be for CPRL to hold the voting securities it owns in its carrier subsidiaries in a voting trust while CPRL acquires ownership and control of NS and seeks STB approval of a CP-NS merger? To answer this question, CPRL asks the Board to assume that a proposed structure for a CPRL-CP voting trust would satisfy the independence and irrevocability requirements of 49 C.F.R. § 1013.1 & 1013.2. Obviously, in making this assumption, the Board *cannot* rule on, or even be said to preordain its ruling on, a yet-to-be-submitted-for-approval actual voting trust agreement. Nonetheless, assuming that parties will comply with their legal obligations in the future is a valid exercise for declaratory action purposes. *E.g., Water Transport Ass'n – Petition for Declaratory Order*, 367 ICC 559, 567 (1983) (“We do not consider a declaratory order proceeding to be an appropriate forum for considering speculative future violations of the law”).

Nor does the instant petition address or seek a ruling on whether the inchoate voting trust “would be consistent with the public interest” under 49 C.F.R. § 1180.4(b)(4)(iv). It would be premature for CPRL to seek such a determination now as the rule requires applicants to make the public interest showing after submitting a notice of intent to file a merger application. *Id.* Further, the public interest showing is best made with NS’s collaboration and the benefit of access to NS’s data, and when the basic terms of the merger are known, *i.e.*, after a merger agreement is reached. Accordingly, CPRL presents no evidence on the public interest question at this time, and a ruling on the narrow question presented here *cannot* be said to determine, or to

predetermine, what the STB's decision might be on the public interest standard if and when CPRL and NS formally propose, in accordance with the referenced regulation, approval of an actual voting trust. When the applicants make such a proposal, all interested parties will have ample opportunity under the established procedures to provide their views fully on any matters that are relevant to the public interest considerations, and the Board will have the benefit of a fully developed record on which to base its public interest finding.

**B. It Would Be Permissible for CPRL's Voting Securities in CP to Be Held in Trust**

As presented, this Petition seeks a declaration about a narrow legal issue of first impression under the new merger guidelines: would a potentially permissible way to avoid unlawful control be for CPRL to hold the voting securities it owns in its rail carrier subsidiaries in an independent, irrevocable voting trust, and then – *after* the CP shares are in the voting trust – acquire NS stock and seek STB merger approval? Analysis begins, as it must, with the governing statutory language: “(a) The following transactions involving rail carriers providing transportation subject to the jurisdiction of the Board under this part may be carried out only with the approval and authorization of the Board: . . . (5) Acquisition of control of a rail carrier by a person that is not a rail carrier but that *controls* any number of rail carriers.” 49 U.S.C. § 11323(a)(5)(emphasis added).<sup>13</sup> This language precludes a holding company that controls one (or more) rail carrier(s) from acquiring control of another rail carrier prior to STB approval, and by implication allows a holding company that does not control any other rail carrier to acquire such

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<sup>13</sup> A “rail carrier” is defined as “a person providing common carrier railroad transportation for compensation.” *Id.* at § 10102(5).

control without STB approval.<sup>14</sup> In control situations involving two rail carriers, as here, nothing in the statutory language precludes the voting securities of either of them from being placed in trust as a means to avoid a control violation.

Voting trusts are a well-established and accepted means of seeking to avoid a control violation. *E.g., B.F. Goodrich Co. v. Northwest Industries, Inc.*, 303 F. Supp. 53, 61 (D. Del. 1969)(“the creation of an independent voting trust for stock, the prior control of which without Commission approval constituted a [Interstate Commerce Act] section 5(4)[<sup>15</sup>] violation, was effective to avoid the violation and the Commission was authorized to give it that effect”)(citations omitted). The Board has found that its authority over voting trusts “is inherent in our statutory authority over rail mergers,” *Major Rail Consolidation Procedures*, 5 STB at 567, and has permitted their use “during the pendency of control applications, so long as the trust would not result in unlawful control.” *Id.* at 566. A trust will not result in unlawful control if it is: established before “a controlling block of voting securities [in another railroad] is purchased”; independent; and irrevocable. 49 C.F.R. §§ 1013.1 and 1013.2.

CPRL’s proposal to hold the CP rail carriers, not NS, in trust is responsive to STB’s indications it would take a “more cautious approach to future voting trusts” based on whether “a proposed transaction would undermine the financial integrity of the applicant carriers.” *Major Rail Consolidation Procedures*, 5 STB at 567. The CP rail carriers, having adopted the precision railroading model, are financially healthy, and on an upward trajectory that can be maintained by the current management team, which will largely remain intact, under an independent trustee. NS

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<sup>14</sup> Berkshire Hathaway’s acquisition of BNSF is an example of acquisition of control of a major railroad that was not subject to STB approval because, according to Berkshire Hathaway, it did not control another rail carrier at the time.

<sup>15</sup> Section 5(4) provided in relevant part: “Whenever a person which is not a carrier is authorized, by an order entered under paragraph (2) of this section, to acquire control of any carrier or of two or more carriers, such person thereafter shall . . . be considered a carrier . . . .”

could be strengthened by adoption of the model's principles under Mr. Harrison's active leadership in line with CPRL's control and ownership of NS. This approach of having the CP rail carriers in trust, not NS, offers the best opportunity for both carriers to maintain their financial integrity during the process. *See SF-SP*, 1983 ICC Lexis 70 at \* 17 (approving trust on basis that trustee entity would not "be financially weakened by the subject proposal").

Not putting NS in trust, while allowing Mr. Harrison's employment at NS during the approval process also reduces the potential for service problems related to integrating operations if the proposed merger is allowed. *See Major Rail Consolidation Procedures*, 5 STB at 561 (indicating that because "significant service problems can arise during the transitional period when merging firm integrate their operations" the Board "will weigh the likelihood of transitional service problems"). Under the proposed voting trust structure, Mr. Harrison can start the process of developing similar corporate cultures and operational practices during the approval process, thus reducing the risk of transitional service problems arising if the merger is approved and the two companies are ultimately combined. The Board has in the past found the types of operational changes that Mr. Harrison would make to implement the precision railroading model at NS *not* to constitute a control violation. *See Canadian National Railway Co., et al.—Control—Illinois Central Corp., et al.*, STB Finance Docket No. 33556, Decision No. 6 at 5 (Aug. 14, 1998)(finding the management or operations changes made "do not demonstrate unlawful control"); *see also id.* Decision No. 37, Appendix D, p. 126 (May 21, 1999)(declining to find that certain actions taken by Mr. Harrison upon arrival at CN constituted premature unlawful control).

For purposes of this Petition only, the Board should assume the trustee independence and irrevocability provisions can and will be met.<sup>16</sup> In addition, the merger procedures for major transactions, which a CP-NS combination would be, require prior approval of a voting trust. 49 C.F.R. § 1180.4(b)(4)(iv). Thus, the conditions for ensuring the trust will not result in a control violation should be assumed met for purposes of this declaratory order Petition only.

By creating a voting trust that is irrevocable and whose trustee operates independently, the creator of the trust divests itself of control over the rail carrier in trust during the STB merger approval process. *See Water Transport Ass'n*, 715 F.2d at 585 n. 10 (upholding “the voting trust only as an interim device to permit the ICC to hold a hearing”). In the instant matter, where the CP U.S. rail carriers and NS are subject to STB jurisdiction, nothing in the statutory language (as discussed above) or in the case precedent precludes either the stock of the CP carriers or of NS from being held in trust as part of a merger transaction. Either scenario achieves the same result: CPRL is in control of only one carrier during the entire regulatory review process. In an analogous situation involving a non-carrier seeking to gain control over two independent, albeit affiliated, carriers, the ICC stated that either carrier could be put in trust:

To transfer the shares of Hall’s and Warren to a single voting trust would result in placing the independent trustee in the position of controlling two motor carriers without appropriate authorization from the Commission in violation of section 11343. If the shares of both motor carriers are to be transferred, the appropriate action for Reliance to take would be to create two separate independent voting trusts with separate independent trustees. Since Reliance is at present a noncarrier, all that is required to avoid an unauthorized control situation is the removal from the control of Reliance of one of the two motor carriers controlled by Tiger.

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16 *See Santa Fe Southern Pacific Corp.*, Finance Docket No. 30400, 1983 ICC Lexis 70 at \*6 (Dec. 22, 1983) (“no basis for asserting that the voting trust will not ensure against unlawful control. Such assertion, it is argued, rests on the assumption that the trustee will disregard its obligations under the terms of the voting trust, or that the trust does not exist. This proposition would hold true in every case of a proposed consolidation because it assumes unlawful conduct on the part of management in every case. Such an assumption would make voting trusts useless and makes consolidation of regulated carriers difficult if not impossible.”).

*Reliance Group Holdings, Inc.*, 366 ICC 446, 452 n. 7 (1982).<sup>17</sup> The ICC further indicated that Reliance could choose which of the two companies to put in trust and which to control based on their relative financial health. *See id.* at 454.

For the reasons discussed, CP requests the Board to declare that one permissible vehicle for seeking to avoid a control violation would be for CPRL's ownership of its rail carrier subsidiaries' voting securities to be held in an independent, irrevocable voting trust during the STB approval process for a CP-NS merger.

**II. A DECLARATORY RULING THAT, SUBJECT TO CERTAIN CONDITIONS, CP'S CEO COULD TERMINATE HIS TIES TO CP AND BE EMPLOYED BY NS PENDING STB MERGER APPROVAL IS APPROPRIATE**

CPRL seeks a declaratory ruling on a second narrow legal issue: whether it is potentially permissible for the current CP CEO, E. Hunter Harrison to resign his position with CP and assume the comparable position at NS?<sup>18</sup> The Board has permitted management switches in transactions in the past, and has addressed any legitimate concerns regarding increased risk to competition between the carriers by imposing conditions on compensation and conduct and by relying on its ongoing authority to impose conditions and its continuing oversight and enforcement authority. *See generally SF-SP*, Finance Docket No. 30400, 1983 ICC Lexis 70 (Dec. 22, 1983). CPRL seeks clarification that inclusion of similar conditions related to

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<sup>17</sup> In this regard, the law is concerned only with "common control," and not every change in control. Thus, a non-rail entity's acquisition of control of one carrier is not subject to STB regulatory approval. 49 U.S.C § 11323(a)(4). Likewise, changes in corporate management and governance are ordinarily beyond the Board's regulatory reach. It is instructive that, in disapproving the SF-SP merger application, the ICC allowed the holding company to choose whether to divest SP, the trustee carrier, or ATSF which was not in trust. *Santa Fe Southern Pacific Corp.—Control—Southern Pacific Transportation Co.*, 2 I.C.C. 2d 709, 835-36 (1986) ("SF-SP") ("SFSP may of course sell the ATSF instead").

<sup>18</sup> It should be noted that in the unlikely event that a merger is disapproved, Mr. Harrison would not return to CP, but would remain with NS.

executive compensation and conduct, together with the Board's oversight and enforcement authority remains a sufficient means of addressing any such concerns. Because this is also a matter of first impression under the 2001 guidelines for Class I mergers, such a declaration by the Board is appropriate because it would remove uncertainty and reduce the potential for future controversy.

This issue implicates two statutory rail policy objectives: "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail" and "to minimize the need for Federal regulatory control over the rail transportation system and to require fair and expeditious regulatory decisions when regulation is required." 49 U.S.C. §§ 10101(1) and (2). On the one hand, company executives moving from the acquirer company to the to-be-acquired company arguably raises control concerns, given that control has been described as "the power to manage the day to day affairs of the entity assertedly controlled." *Declaratory Order — Control — Rio Grande Indus., Inc.*, Finance Docket No. 31243, slip op. at 3 (ICC served Aug. 25, 1988). The concern is that unlawful control in this context can lead to reduced competition and diminished transportation service for the public. *See Water Transport Ass'n — Petition for Declaratory Order*, 367 ICC 559, 564 (1983) ("Important considerations are whether the proposed acquisition would prevent the water carrier in the future from being operated in the advantage of, and for the convenience of the people, and whether such control by the rail carrier would prevent, exclude, or reduce competition").

On the other hand, regulatory interference with railroad personnel decisions should be minimized. Company officers and management frequently move from railroad to railroad without STB oversight. Indeed, many of CP's top management today, including Mr. Harrison, were previously employed by other railroads. As acknowledged in *SF-SP* in allowing four SP

officers to move to the SFSP, which was not in trust, normally the Board does not become involved in management changes. *See SF-SP*, 1983 ICC Lexis 70 at \* 15-16 (“we cannot agree with UP that the departure of four of 19 SPT officers constitutes a ‘brain-drain’. It should be remembered that under normal circumstances all of SPT’s officers could depart at the same time, and we would be powerless to prevent it.”).

This recognizes that who should run a railroad is the prerogative of its stockholders (acting through the board of directors), not regulators. Congress gave the STB express authority over personnel issues only with regard to interlocking officers and directors. *See* 49 U.S.C. § 11328(a). Congress placed no restrictions on railroad officers and directors leaving one railroad and joining another. Until evidence of actual wrongdoing is presented, the STB has no reason to interject itself in such decisions. *See Water Transport Ass’n*, 715 F.2d at 585 (noting “if CSX were to attempt to influence barge operations notwithstanding the trust, the ICC could act at that time; an injunction was not needed to prevent speculative future violations. Finally, to the extent the statute was ambiguous, policy considerations favored an interpretation that would avoid interference in the workings of the marketplace.”)(internal quotation marks and citations omitted).

To relieve the tension between seeking to safeguard against potential unlawful control and minimizing regulation in an area where the STB would not normally intrude, the Board can adopt conditions that diminish, if not eliminate, the possibility of unlawful control. *See SF-SP, supra*, \* 16 (finding that “during the pendency of any proposed merger, there may well be a diminished incentive to compete vigorously with a prospective consolidation partner. But this is not adequate reason to prohibit the proponents from seeking regulatory approval, since any other conclusion would result in mergers never taking place. Through the use of an independent voting

trust, which imposes duties of independent action, together with our authority to impose conditions, we conclude that possible anti-competitive effects can and will be minimized.”).

In mergers raising these concerns, the Board/ICC has focused on compensation and conduct as the most likely potential sources of control concerns, and formulated conditions designed to limit the possibility for reduced competition. *Illinois Central Corp. –Common Control*, Finance Docket No. 32556, slip op. at 5 (ICC Oct. 19, 1994) (“*IC-KCS*”) (recognizing importance of “[m]aintaining the present competitive posture of the two carriers (wherever they compete)”); *see* 49 U.S.C. § 11904 (prohibiting exchange of commercially sensitive data about competitive traffic).

As to compensation conditions, their primary purpose has been to provide proper incentives for those officers remaining at the trustee railroad to devote their full efforts to maximizing the value of that railroad during the term of the voting trust. *See SF-SP*, 1983 ICC Lexis 70 at \* 17 (conditioning compensation plan to avoid possibility of “reduced incentive for competition”). Thus, in the SF-SP proceeding, the Board restricted compensation which was based on the parent’s performance for the duration of the voting trust. *See id.*, Appendix paragraph 2 (“no officer of SPT during the terms of the voting trust may be awarded any right to benefits whose economic value depends upon the profitability of SFSP”). Accordingly, for the management team that remains with CP, the carriers in trust, any legitimate concerns regarding diminished competition can be sufficiently addressed by communications conditions (discussed below) and by structuring compensation to ensure that CP management is incentivized to act in CP’s best interest, *e.g.*, by placing decisions regarding bonuses within the independent trustee’s sole discretion. *See IC-KCS*, slip op. at 5 (asking whether “the trustee rather than the holding company [should] be responsible for determining bonuses”); *see also SF-SP*, 1983 ICC Lexis 70

at \* 5 (“effectiveness of the trust depends on the independence of the trustee in the creation and administration of the trust”).

As to communications conditions, the Board has previously expressed concerns about competitive information that carries forward when executives transfer as well as about communications between the transferred executives and persons at their prior railroad. *See IC-KCS*, slip op. at 5 (raising question of whether to “impose a condition to the effect that none of the officers who have access to ICRR competitive information will use such information to the competitive advantage of KCSR relative to ICRR or participate in any management decisions affecting that competitive relationship”); *see SF-SP*, 1983 ICC Lexis 70 at \* 16 (setting conditions that “none of the officers who had access to SPT competitive information will use such information to the competitive advantage of ATSF relative to SPT or participate in any management decisions affecting that competitive relationship.”). In the instant matter, these conditions would translate to the following: Mr. Harrison will not use CP competitive information to the competitive advantage of NS relative to CP or participate in any NS management decisions affecting that competitive relationship.

A key factor where communications conditions were either imposed or considered is that the applicants were competitors, thus raising concerns about potential lessening of competition. The SF-SP proceeding involved head-to-head competitors with overlapping networks, which raised significant competition issues that ultimately led to its disapproval. Likewise, the IC-KCS proceeding involved parallel networks that potentially raised significant competition issues. By contrast, CP and NS are not head-to-head competitors; their networks have almost no overlap, but join end-to-end, with few, if any, situations where a shipper currently served by both CP and NS would have only a single shipping option after the merger (“2-1 shippers”). This distinction

means the potential for lessening of competition during the voting trust here is substantially smaller than was true in either *SF-SP* or *IC-KCS*. In this sense, the instant transaction would be similar to the end-to-end, highly successful CN-IC transaction where a limited number of IC executives resigned their positions at IC, which was put in trust, and moved to CN. Specifically, IC's President and CEO at the time, Mr. Harrison resigned and became Executive Vice President and Chief Operating Officer of CN, and two IC directors (including the Chairman of the IC board) resigned and joined the CN board. *See e.g.*, PRNewswire, *Canadian National To Acquire Illinois Central In Strategic Combination Valued At US\$3 Billion* (Feb. 10, 1998) attached as Exh. G. The Board imposed no conditions on the shift and declined to find unlawful premature control. *Canadian National Railway Co., et al.—Control—Illinois Central Corp., et al.*, STB Finance Docket No. 33556, Decision No. 6 at 5 (Aug. 14, 1998). This suggests that the need for compensation conditions is virtually non-existent where the merging railroads are joined end-to-end, and that the communications conditions that the Board found sufficient to guard against diminished competition in *SF-SP* would plainly be more than sufficient here.

As in the CN-IC transaction, the proposed management shift here is designed to increase the financial health and operational efficiency of the carrier not in trust, *i.e.*, to protect and enhance the value of NS. As Mr. Harrison explains, the purpose of his move from IC to CN was to begin making operational improvements at CN by implementing the precision railroading model which he did while continuing to operate CN independently and separately from IC. *See Harrison V.S.* at 2-3. As with the CN and IC, CP and NS would continue to operate as separate and independent carriers during the voting trust. *Id.* at 6. Getting a head start on implementing well-proven railroad operating and management practices at NS responds to two key concerns expressed in the *Major Rail Consolidation Procedures*: the financial health of the carriers if

divestiture is required and potential service integration issues. The head start is intended to protect and enhance the value of NS during the regulatory process, not to exercise unlawful control. *Id.* at 4-5. A head start has the added benefit of aligning organizational cultures and operating practices which eases merger integration as demonstrated by the virtually trouble free CN-IC merger. *Id.* at 3.

Accordingly, CPRL requests that the STB declare that: it would not constitute a control violation for the CP's CEO to assume a comparable position at NS during the pendency of a CP-NS merger proceeding and that, to the extent there are legitimate concerns regarding an increased risk of unlawful control, conditions regarding compensation and conduct similar to those imposed in *SF-SP*, together with the STB's ongoing authority to impose conditions, oversight and enforcement authority, should be sufficient to address such concerns.

CPRL recognizes that, should the STB grant this request: (1) CPRL would still need to demonstrate that the specific voting trust to be established would not result in unlawful control and would be consistent with the public interest and (2) if the STB were to approve that voting trust, CPRL would still need to demonstrate in a merger/control application that the CP-NS combination satisfies the public interest criteria prescribed in 49 U.S.C. § 11324. CPRL submits, however, that the voting trust structure outlined in this Petition would provide an appropriate, and possibly the best, opportunity for preserving and enhancing the soundness of each affected rail carrier and hence the ability of each carrier to provide high quality service to its customers regardless of the outcome of an application proceeding.

### CONCLUSION

WHEREFORE, CP requests expedited consideration of this matter, and that the Board issue declaratory rulings on the issues raised in this Petition on or before May 6, 2016.

Respectfully submitted,

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*Counsel for Canadian Pacific Railway Limited*

Dated: March 2, 2016

BEFORE THE  
SURFACE TRANSPORTATION BOARD

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FINANCE DOCKET NO. 36004  
CANADIAN PACIFIC RAILWAY LIMITED

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PETITION FOR EXPEDITED DECLARATORY ORDER

*Verified Statement of*

**E. Hunter Harrison**  
Chief Executive Officer  
Canadian Pacific

March 2, 2016

My name is E. Hunter Harrison. I am currently Chief Executive Officer (CEO) of Canadian Pacific (CP). I am submitting this verified statement in support of CP's parent corporation, Canadian Pacific Railway Ltd.'s (CPRL), petition for a declaratory order that the voting structure that CPRL has proposed in its offer to acquire Norfolk Southern (NS) is a viable option.

Clear guidance from the Surface Transportation Board (Board or STB) on this issue is critical to the smooth functioning of the market. In the last couple of months I have spoken with many NS stockholders who have uniformly expressed support for a combination and for the proposed voting trust structure as a key element of the proposed transaction. Since NS has refused to engage in discussions with CPRL regarding a business combination, CPRL proposed a stockholder resolution that simply asks NS's board to sit down and negotiate in good faith with CPRL. Despite their support, many NS stockholders have also voiced concern that the STB might not approve the proposed voting trust structure, and NS has repeatedly cited the risk of non-approval as a sufficient basis for not talking to us. Stockholders of both NS and CPRL, and NS itself, have asked us to seek guidance from the Board so that they can make an informed decision on whether discussions between CPRL and NS could be fruitful.

While my career as a railroader spans five decades, the previous positions that are pertinent for present purposes include President and CEO of Illinois Central Railroad (IC) from 1993 to 1998 at which point I resigned to become Executive Vice President and Chief Operating Officer of Canadian National Railway (CN) when IC and CN merged. From 2003 to 2009, I was CN's President and CEO. My move from IC to CN is pertinent here because it offers a road map for what I intend to do if the CP rail carriers are placed in an independent voting trust and CPRL

enters into a merger agreement with NS that provides for me to sever ties with CP and be hired by NS as its CEO while the parties seek approval of the transaction from the STB.

Over the last several decades, I have helped develop and refine the precision railroading model, which I have successfully implemented at IC, CN, and CP, and propose to employ at NS. I explained the philosophy behind the precision railroading model in a two-volume book set called *How We Work and Why* (2005). The model is based on five core principles: improving customer service and asset utilization, controlling costs, increasing safety, and valuing and rewarding employees. It is a scheduled railroading model that focuses relentlessly on how to move each customer's shipment from origin to destination as quickly, efficiently and safely as possible. In bringing precision railroading to each new company, I view my role as not simply to present a plan of how the railroad can be more efficiently and effectively operated, but also to bring about a cultural change among employees at all levels, so that everyone is working to incorporate the core principles into every aspect of the business. To do this, I get personally involved by studying the current railroad operations to identify areas where improvement is needed, by making any needed changes, by instructing how the core principles can and should be adopted throughout the business, and by empowering all employees to suggest ways that we can improve.

While I understand this is not the time to demonstrate the public interest benefits that will flow from applying the precision railroading model to a combined CP-NS, my track record speaks for itself in that IC, CN, and CP in a very short time went from industry laggards to industry leaders where they have remained. This track record should give the Board a solid basis for agreeing that the management shift we are proposing as part of our voting trust structure will

likely enhance the value of NS during the merger approval process as well as pave the way for a trouble-free transition if the merger is approved.

I understand that the Board has expressed concern in the past that the use of the voting trust could harm the carrier in trust or the acquiring carrier should the transaction not receive regulatory approval and one of the carriers must be divested. The voting trust structure that we have proposed is designed to address this concern. CP is already operating well under the precision railroading model. While there is more work to be done at CP, I am fully confident that the CP carriers while in trust, will continue to improve and prosper under the leadership of current President and Chief Operating Officer, Keith Creel and his team. I am also confident that implementing the precision railroading model at NS would both protect and enhance the value of NS during the regulatory review process. Thus, the proposed structure improves over the more familiar voting trust structure for rail transactions by assuring that the carrier needing less attention is the one placed in trust. This makes it more likely that both carriers increase in value and, if either must be divested, the carriers, stockholders and shipping public will not be harmed, but will be better off.

Also, I understand that the Board has expressed concern in the past about possible reduced competition when executives from the acquiring railroad begin to work at the to-be-acquired railroad during the STB approval process, even though the stock of the to-be-acquired railroad is in trust. In my mind, several factors should minimize those concerns if I and any other CP executive move to NS. First, I would resign from CP and would become an employee of NS, as would any other executive transferring to NS. Further, if the transaction ultimately were not approved there would be no plan or expectation that any of us would leave NS to rejoin CP. In

fact, I plan to remain at NS until it has become industry leader and can sustain that position before giving retirement a second chance.

Second, as my history shows, each time I moved to a new railroad and employed the precision railroading model, that railroad's value has increased within a very short period of time. I am proud of what has been accomplished and have every reason to want this string of successes to continue. If I have the honor of serving as NS CEO, my goal will be to make NS the very best railroad in the world. If the STB approves the combination of CP and NS, my goal will be to integrate the two systems as flawlessly as possible. I can assure you that it is not in my makeup to give anything less. Any suggestion that I would jeopardize this legacy by exercising premature common control is not rational.

Third, the voting securities of the CP rail carriers, not NS, will be in an independent voting trust, so that, once the transaction closes, NS will be owned and controlled by a holding company that does not "control" any other carrier. This should help address any concerns that I, or any executive transferring with me, would be faced with divided loyalties and confirm that we would have every incentive to enhance NS's value during the approval period. Likewise, it assures that the CP carriers are insulated by the trust from common control.

Fourth, executive compensation at each carrier during the voting trust will be based on the performance of the carrier that employs him/her. This should ensure that each executive is properly incentivized to act in the best interest of his/her carrier employer.

Besides these factors, there simply is not the same risk that my move to NS would lessen competition to the degree that might be possible with management transfers in mergers of head-to-head competitors with overlapping or parallel networks. CP and NS join end-to-end with little overlap, and do not generally compete head-to-head. In this regard, a CP-NS merger would be

closer to the CN-IC transaction, where I and two IC board members resigned our positions with IC and joined CN without the STB raising any concerns that the shift would lessen competition or constitute unlawful premature control.

Nevertheless, I understand that the Board, where legitimate concerns about potential reduction in competition have been shown, has conditioned management transfers to prevent the use of confidential information from the prior railroad to be used against it and for the transferring management not to participate in any decisions affecting the competitive relationship of the two railroads. I have no intention of using confidential information from CP either to advantage NS or disadvantage CP competitively. To allay any such concerns; I would recuse myself from discussions and decisions affecting the competitive relationship between CP and NS. Any executive transferring from CP to NS during the regulatory review period would abide by these same commitments.

I am familiar with the restrictions applicable during the voting trust period and intend to fully comply with such restrictions as well as any additional conditions that the STB indicates should be applied here. I believe that there is a tremendous opportunity to make NS an even better, more efficient, and financially stronger railroad than it is now while ensuring that until the STB determines whether to grant authorization to combine, NS and CP continue to operate as separate and independent rail carriers.

**VERIFICATION**

I, E. Hunter Harrison, verify under penalty of perjury under the laws of the United States that the foregoing Verified Statement is true and correct.

A handwritten signature in black ink, appearing to be 'E. Hunter Harrison', written over a horizontal line.

E. Hunter Harrison

## **Exhibit A**

EX-99.1 2 nspr120415.htm PRESS RELEASE



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**FOR IMMEDIATE RELEASE****NORFOLK SOUTHERN BOARD OF DIRECTORS UNANIMOUSLY REJECTS  
UNSOLICITED INDICATION OF INTEREST FROM CANADIAN PACIFIC*****Canadian Pacific's Indication of Interest is Grossly Inadequate and  
Not in the Best Interests of Norfolk Southern and Its Shareholders******Transaction Would Face Substantial Regulatory Risks and Uncertainties  
Highly Unlikely to Be Overcome******Norfolk Southern Confident That Its Strategic  
Plan Will Deliver Compelling Shareholder Value******Company to Host Conference Call at 8:30 am ET Today***

Norfolk, Va., December 4, 2015 – Norfolk Southern Corporation (NYSE: NSC) (“Norfolk Southern” or the “Company”) today announced that its board of directors has unanimously rejected Canadian Pacific’s (TSX:CP)(NYSE:CP) previously announced unsolicited, low-premium, non-binding, highly conditional indication of interest to acquire the Company for \$46.72 in cash and a fixed exchange ratio of 0.348 shares in a new company that would own Canadian Pacific and Norfolk Southern. After a comprehensive review, conducted in consultation with its financial and legal advisors, the Norfolk Southern board concluded that the indication of interest is grossly inadequate, creates substantial regulatory risks and uncertainties that are highly unlikely to be overcome, and is not in the best interest of the Company and its shareholders.

“We believe in our ability to generate greater shareholder value through execution of our strategy – delivering efficient and superior service to build a more profitable franchise based on price and volume growth, implementing efficiency measures, and increasing returns on capital to strengthen our financial performance, all while maintaining our disciplined capital return strategy,” said Chairman, President and CEO James A. Squires. “Norfolk Southern has made growth investments and we expect to realize the benefits of these investments in the years ahead, especially as our intermodal volumes continue to build. Specifically, we expect to achieve an operating ratio below 70 in 2016 with additional improvements over the next five years resulting in increasing ROE and an operating ratio below 65 by 2020. By maximizing our asset utilization, we believe we can achieve double-digit compounded EPS growth over this period. In short, Norfolk Southern is well positioned to deliver compelling value to our shareholders.”

Mr. Squires continued, “There is a high probability that, after years of disruption and expense, the proposed combination would be rejected by the Surface Transportation Board (“STB”). We also believe the STB would reject Canadian Pacific’s proposed voting trust structure, and that there is no certainty that any other voting trust structure would be approved. Even if the

proposed combination were ultimately to be cleared, it would be subject to a wide range of onerous conditions that would reduce the value of the stock consideration that has been proposed.”

Mr. Squires concluded, “We believe that Canadian Pacific’s short-term, cut-to-the-bone strategy could cause Norfolk Southern to lose substantial revenues from our service-sensitive customer base. We also believe the proposed transaction risks harm to vital transportation infrastructure and the communities we serve. Any strategy that hurts our customers and the broader community is highly unlikely to receive regulatory approval and is inconsistent with the delivery of shareholder value over the long-term.”

The Norfolk Southern board, composed of 13 directors, 11 of whom are independent, undertook a comprehensive review of the Canadian Pacific proposal. The Norfolk Southern board, in making its determination, considered among other factors:

- **The Canadian Pacific indication of interest substantially undervalues Norfolk Southern**
    - Norfolk Southern, under the direction of its board of directors and a recently appointed Chief Executive Officer, is successfully executing a strategic plan to drive operational improvements. The board is confident that the continued execution of this strategic plan is superior to Canadian Pacific’s grossly inadequate and high-risk proposal.
    - The board believes that Canadian Pacific’s indication of interest is opportunistically timed to take advantage of a Norfolk Southern market valuation that has been adversely affected by a challenging commodity price environment, does not fully reflect infrastructure investments Norfolk Southern has made, and does not incorporate the upside from further improvements anticipated to result from the initiatives that the Company is implementing.
  - **Norfolk Southern is successfully executing on its strategy**
    - Norfolk Southern’s management team is successfully executing a number of revenue growth initiatives focused on pricing discipline and growth in merchandise and intermodal market opportunities.
    - Norfolk Southern’s strategic plan is focused on providing superior customer service, continuing the recent improvement in network performance, and implementing efficiency measures, including managing headcount, increasing locomotive productivity, and integrating technological innovations.
    - Norfolk Southern’s strategic plan provides for double-digit compounded EPS growth over the next five years, increasing ROE, and, by 2020, an operating ratio below 65.
    - Norfolk Southern is committed to pursuing a disciplined capital allocation strategy while investing appropriately in its network. Over the past 10 years, since the inception of its share repurchase program, the Company has distributed nearly \$15 billion to shareholders, consisting of an average of approximately \$1 billion in share repurchases per year and a steadily increasing dividend with a 10-year annual compound growth rate of 14%.
  - **Transaction would face substantial regulatory risks and uncertainties that are highly unlikely to be overcome**
-

- o The board believes that the proposed transaction is unlikely to be completed given the substantial regulatory risks. Notably, any transaction must be determined by the STB to both “enhance competition” and be in the “public interest”.
  - o Given the extended review process of two years or more and the uncertainty of approval, there would be significant disruption to Norfolk Southern’s business and operations.
  - o The Norfolk Southern board also believes that in the event the transaction did close, it would be only after the imposition of substantial regulatory conditions compromising the potential benefits of a combination and reducing the value of the proposed stock consideration.
- **There is no certainty that the STB would approve a voting trust - the voting trust structure proposed by Canadian Pacific is unprecedented and likely would not be approved**
    - o Contrary to Canadian Pacific’s claims, a voting trust under which a transaction would close prior to final STB approval of the merger would not protect Norfolk Southern shareholders from regulatory uncertainty. Under STB rules established in 2001, any voting trust would require both a public comment period and approval by the STB based on a finding that the voting trust itself is in the public interest. There is no certainty that the STB would approve use of a voting trust.
    - o The voting trust structure proposed by Canadian Pacific is unprecedented, and it is highly likely it would be rejected by the STB because the Canadian Pacific management team would control or be substantially involved in the operations of Norfolk Southern prior to receiving regulatory approval of the proposed merger transaction.
- **The proposed transaction would be detrimental to Norfolk Southern’s customer base and communities**
    - o Canadian Pacific’s unilateral open access proposal would undercut the financial performance of the combined entity as well as degrade service and dis-incentivize investment.
    - o Any strategy that adversely impacts Norfolk Southern’s service-sensitive customer base and communities is unlikely to receive regulatory approval and is inconsistent with the delivery of shareholder value over the long-term.
- **Canadian Pacific’s synergy targets are overstated and imply significant reduction in investment to maintain service**
    - o Canadian Pacific’s overstated synergy targets imply significant reduction to investment and employment levels, which the board believes would harm service levels and would be unacceptable to the STB.
    - o Operating synergies are limited because the Canadian Pacific and Norfolk Southern networks serve entirely separate regions and only connect at five points.
    - o Any near-term cost savings that might result from applying Canadian Pacific’s short-term focused operating model on Norfolk Southern would be offset by traffic diversions, service deterioration and loss of service-sensitive customers.
-

- o Open access has been widely documented to produce negative revenue synergies from traffic loss and rate compression while also increasing operating costs.
- **The transaction would not help Chicago congestion issues**
  - o As the smallest Class 1 railroad in Chicago, accounting for less than 5% of all Chicago rail traffic, Canadian Pacific's volumes are too small to impact Chicago rail traffic.
  - o The proposed transaction would likely increase Chicago congestion.
    - Less than 15% – or less than one train per day – of current Canadian Pacific-Norfolk Southern connecting traffic can be efficiently rerouted around Chicago.
    - Further, Norfolk Southern believes that the proposed transaction would cause more, not less, traffic congestion in Chicago. We expect Canadian Pacific would increase revenues by converting interline traffic between Norfolk Southern and both BNSF Railway ("BNSF") and Union Pacific ("UP") to single-line traffic in the proposed Canadian Pacific-Norfolk Southern system. Much of this Norfolk Southern traffic with BNSF and UP avoids Chicago today. Unlike BNSF and UP, Canadian Pacific does not have efficient Chicago bypass routes, so Canadian Pacific would have to route most of this traffic through Chicago.
  - o Not only do the lines of Canadian Pacific and Norfolk Southern not physically connect in Chicago, but neither company's traffic can be moved to other Canadian Pacific-Norfolk Southern connecting points without all constituencies incurring substantial extra miles, cost and time.

The following is the text of the letter that was sent on December 4, 2015, to Canadian Pacific's Chief Executive Officer, E. Hunter Harrison, and its Chairman of the Board, Andrew F. Reardon.

Mr. E. Hunter Harrison  
Chief Executive Officer  
Canadian Pacific  
7550 Ogden Dale Road S.E.  
Calgary, AB T2C 4X9  
Canada

Mr. Andrew F. Reardon  
Chairman of the Board  
Canadian Pacific

Dear Mr. Reardon and Mr. Harrison:

The board of directors of Norfolk Southern Corporation, in consultation with its financial and legal advisors, has carefully reviewed your letter dated November 9, 2015, that we received on November 17, 2015, regarding a potential acquisition of Norfolk Southern. After a thorough analysis, the board of directors has unanimously determined that the proposed consideration set forth in your letter of \$46.72 in cash plus 0.348 shares in a new company which would own Canadian Pacific and Norfolk Southern is grossly inadequate and substantially undervalues Norfolk Southern. Further, the board determined that the transaction proposed by you gives rise to substantial risks and uncertainties and is not in the best interest of Norfolk Southern and its shareholders.

The risks and uncertainties result from the substantial regulatory hurdles that exist, which are highly unlikely to be overcome. We believe the regulatory review process would take two years or more from now, with a very low likelihood of approval. Even in the unlikely event of approval, Norfolk Southern would be in limbo for this extended period, causing loss of momentum and disruption to our business and operations. In addition, substantial regulatory conditions would be required to win regulatory approval, adversely affecting the value of the combined company and the stock our shareholders would receive.

While you have publicly raised the possibility that a voting trust could be used so a transaction could be closed before full regulatory approval has been obtained, you failed to disclose the fact that any voting trust would require a public comment period and regulatory approval process, with approval based on the STB finding that such a trust is in the public interest. There is no precedent for a voting trust being approved under the new rules adopted in 2001, and there is no certainty that the STB would approve use of a voting trust.

Moreover, the structure you have proposed, under which Canadian Pacific would take control of the management and operations of Norfolk Southern, is unprecedented and has never been approved by the STB. As such, we do not believe that regulators would approve the voting trust structure. In any event, a voting trust structure would not address the uncertain value of the stock our shareholders would receive, as the ultimate value of the combined entity would be impacted in large part by concessions imposed as part of the regulatory review of a transaction.

Beyond not being in the best interests of our shareholders given the regulatory risks and the grossly inadequate value of your proposal, we also believe that the proposed transaction would be detrimental to Norfolk Southern's customer base. We have heard significant concerns from customers regarding a transaction with Canadian Pacific. Further, if Canadian Pacific were to implement its short-term strategy, it would cause Norfolk Southern to lose substantial revenues from our service-sensitive customer base. We also believe the proposed transaction risks harm to vital transportation infrastructure and the communities we serve.

We have seen your public statements regarding a desire to meet. As you know, I was the one who suggested a meeting with you following the incorrect Canadian press reports that we had been discussing a transaction. When we met you suggested the possibility of a further meeting, while acknowledging that the discussion might not be confidential; subsequently, I agreed to a meeting if you and Bill Ackman, the Principal of Pershing Square, a Canadian Pacific board member, and a controlling shareholder, entered into a customary confidentiality agreement, which you refused to do. The fact is that not only did we already meet, but I also offered you several opportunities to provide additional information to our board for it to consider in reviewing the transaction you proposed – you did not provide additional information. In light of the grossly inadequate terms you proposed, and the regulatory risks to both the approval of the transaction and the ultimate value of a combined entity, we do not believe that there is any basis to meet.

Our board of directors and management team are committed to continuing to act in the best interests of Norfolk Southern and its shareholders. Norfolk Southern is executing on

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its strategic plan to implement operational improvements, which the board believes will enhance value for all shareholders. Our board does not believe that the transaction you proposed reflects the value inherent in Norfolk Southern and the benefits of our strategic plan. Accordingly, the board has unanimously rejected your proposed transaction.

Sincerely,  
Jim Squires

Morgan Stanley & Co. LLC and Bank of America Merrill Lynch are acting as financial advisors to Norfolk Southern Corporation and Skadden, Arps, Slate, Meagher & Flom LLP, Hunton & Williams LLP and Morrison & Foerster LLP are acting as legal advisors.

### **Conference Call and Webcast**

Norfolk Southern will host a telephone conference call and a webcast on Friday, December 4, 2015, to discuss the unsolicited indication of interest from Canadian Pacific. Presentation slides will accompany the live webcast, both of which will be available on the Norfolk Southern website. You may participate in this call by dialing (866) 610-1072 for domestic locations or (973) 935-2840 for international locations. A passcode, 93852422, will be required. Jim Squires will comment on the unsolicited indication of interest beginning promptly at 8:30 a.m. Eastern Time before answering questions. The live webcast and accompanying presentation slides can be accessed through the Norfolk Southern website, [www.nscorp.com](http://www.nscorp.com).

A replay of the discussion will be available shortly after the call and can be accessed through [www.nscorp.com](http://www.nscorp.com), or by dialing (800) 585-8367 for domestic locations or (404) 537-3406 for international locations. A passcode, 93852422, will be required.

### **About Norfolk Southern**

Norfolk Southern Corporation (NYSE: NSC) is one of the nation's premier transportation companies. Its Norfolk Southern Railway Company subsidiary operates approximately 20,000 route miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the East and is a major transporter of coal, automotive, and industrial products.

### **Forward-Looking Statements**

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or results, nor will they necessarily prove to be accurate indications of the times at or by which any such performance or results will be achieved. As a result, actual outcomes and results may differ materially from those expressed in forward-looking statements. We undertake no obligation to update or revise forward-looking statements, whether as a result of new information, the occurrence of certain events or otherwise, unless otherwise required by applicable securities law.

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Or

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Joele Frank, Wilkinson Brimmer Katcher  
212-355-4449

## **Exhibit B**

EX-99.1 2 nspr120815.htm PRESS RELEASE



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**FOR IMMEDIATE RELEASE****NORFOLK SOUTHERN RELEASES WHITE PAPER FROM  
FORMER SURFACE TRANSPORTATION BOARD COMMISSIONERS**

***Former Commissioners Francis Mulvey and Charles Nottingham  
Agree with the Norfolk Southern Board of Directors that the STB Would Be Highly Unlikely to  
Approve a Voting Trust or the Transaction Proposed by Canadian Pacific***

NORFOLK, Va., Dec. 7, 2015 -- Norfolk Southern Corporation (NYSE: NSC) (the "Company") today announced that former Surface Transportation Board ("STB") commissioners Francis Mulvey and Charles Nottingham have carefully reviewed voting trust issues and the merger transaction proposed by Canadian Pacific (TSX:CP) (NYSE:CP) and agree with the Norfolk Southern board of directors that both would be highly unlikely to be approved by the STB.

"The Norfolk Southern board is committed to creating value for shareholders and exploring all bona fide opportunities to enhance value," said Chairman, President and CEO James A. Squires. "In that regard, the Company retained nationally recognized regulatory counsel and former STB commissioners to carefully evaluate the regulatory landscape under the 2001 merger rules. The former STB commissioners have concluded that the STB would be highly unlikely to approve a voting trust structure or the merger transaction, as neither would be in the public interest. The Norfolk Southern board remains confident that the continued execution of its strategic plan is superior to Canadian Pacific's grossly inadequate and high-risk proposal."

The following is the text of the white paper from the former STB commissioners.

**Regulatory Review of Proposed CP+NS Merger**

Having formerly served as Chairmen of the Surface Transportation Board ("STB"), we have unique insights regarding how the STB would review the proposed CP+NS merger and any related voting trust mechanism. We publish this white paper to share these insights.

Out of respect for the independent professional judgment of the current members of the STB, we are not attempting to speak on behalf of our former agency. Rather, having been confronted with much misinformation about how the STB is likely to review the proposed voting trust and merger, we feel compelled to correct the record.

As simple background, rail carriers cannot assume control of another carrier without prior STB approval. The STB's approval process can last between 19 and 22 months. Current STB regulations, adopted in 2001, set a high bar for approval of a proposed major merger and related voting trust based on an untested public interest standard. In our expert opinions, the STB is not likely to approve CP's proposed voting trust or the CP+NS merger.

## Voting Trust Approval

STB voting trust regulations have become far more stringent. In the past, the STB routinely and informally permitted carriers to acquire controlling stakes in other carriers using a voting trust, provided that the trustee was independent. This is no longer the case under current STB regulations. A voting trust to be used in conjunction with a proposed major merger (such as CP+NS) now must receive formal STB approval before it is implemented. The STB approval process includes a public comment period where interested stakeholders can object to the proposed use of a voting trust. And, the STB's current approval standard is quite demanding. As was true under the old regulations, the trustee must be independent and the trust must prevent premature, unlawful control; but now under the new regulations, use of the trust *also* must be in the public interest. CP's voting trust would be the first trust reviewed under the STB's new regulations.

If the reports we have read are correct, CP seems to think it can use a voting trust to begin implementing its business plan for NS ("Plan") *during* the STB's merger review process and *prior to* formal STB approval of the merger. This would directly violate the express statutory bar against a premature exercise of common control. CP cannot assume control of NS, by any means, *until* the STB approves the merger – even if a voting trust is used. This conclusion applies regardless of the specific scheme CP might use. No matter how CP executives are put in charge of NS management before the merger is approved, the STB likely would not be fooled into thinking that CP and NS are operating independently.

Further, if CP begins to implement its Plan prior to formal STB review and approval of the merger, CP essentially would usurp and preempt the STB's exclusive jurisdiction to review and approve that Plan and the other effects of the merger. The STB might not take kindly to this circumvention.

Even if CP does not use a voting trust to begin implementing its Plan and exercising control over NS prematurely, we have grave doubts that the STB would find any voting trust to be in the public interest. Because the public interest standard is completely new, even as former Chairmen of the STB, we cannot predict this outcome with certainty. However, we struggle to identify any public interest justifications for CP's voting trust. It is far easier to identify the public interest harms from holding NS in voting trust limbo for nearly 2 years, which could include compromised service for shippers, reduced investments in rail infrastructure and network capacity, and disruptions for NS labor interests.

The STB also could view approval of any voting trust as triggering a domino effect. Under the current STB merger regulations, as discussed below, the Board must consider likely downstream effects as rival carriers react to a proposed merger. When the BNSF+CN merger was proposed in 1999, other Class 1 carriers notified the STB that they would find it necessary to respond in kind. Accordingly, the STB presumes that any major rail merger (such as CP+NS) will trigger further industry consolidation resulting in just two transcontinental carriers, with adverse effects for competition and rail service for shippers. As such, the STB could try to stop the first domino from falling – by rejecting CP's voting trust.

## Merger Approval

As with the voting trust regulations, STB merger regulations have become far more stringent. The current regulations eliminate the historical, longstanding presumption favoring rail industry consolidation. As then-Chairman Linda Morgan testified in a June 2001 Senate subcommittee hearing on the STB's new merger rules:

The old rules said that mergers would be approved unless. The new rules say mergers will be approved only if. Our new rules clearly reflect a greater skepticism about the benefits of future mergers and a greater concern about the potential harm of further consolidation. . . . And it is my hope that, in raising the bar, these rules will remind the railroads to take care of business with the systems they now have and to stop viewing mergers as the only way to go.

The proposed CP+NS merger would be the first merger reviewed under the STB's new regulations.

As in the voting trust review process, there is substantial regulatory uncertainty and risk in the merger review process. Again, the STB approval process includes a public comment period where interested stakeholders can object to a proposed merger. And, the STB has broad discretion to determine if a proposed merger is in the public interest. Under STB regulations, mergers are in the public interest only if substantial and demonstrable gains in key benefits – such as improved service and safety, enhanced competition, and greater economic efficiency – outweigh anticompetitive effects, potential service disruptions, or other merger-related harms.

In the words of former Chairman Morgan, merger applicants have a high bar to clear, including: demonstrating how the merger would enhance competition; addressing the impacts of the merger in conjunction with potential further rail industry consolidation; providing a full-system operating plan in a cross-border merger as well as robust safety and service plans; and proposing conditions that would spring into effect if the merger benefits are not realized or if the STB approves further rail industry consolidation.

The STB can outright reject a proposed merger, or it can approve a proposed merger with conditions designed to safeguard the public interest and to stimulate effective competition. Typical conditions relate to environmental mitigation, labor protection, and safety and service.

### ***CP+NS Merger Review***

Based on our collective experience with prior STB determinations under public interest standards, the STB likely would not approve the proposed CP+NS merger. There is every reason to expect substantial opposition to the merger from other railroads, shippers, labor interests, and community and environmental groups. Especially in this context, it is hard to see any public interest justifications for the CP+NS merger, and the STB could view CP's claims with a large grain of salt.

**(1) Chicago Congestion.** Based on publicly available traffic data, there are limited opportunities for CP and NS to reroute traffic away from Chicago.

**(2) Terminal Access and Bottleneck Proposals.** The STB currently is considering whether open access would increase competitive rail options for shippers. It appears that CP has proposed a voluntary and unilateral open access condition to attempt to show that the merger would enhance competition. Even if this were enough to entice STB approval, the STB would have to define many elements of this open access proposal to make sure that it actually enhances competition in practice. And, open access would destroy value from reduced revenues and degrade service from increased operating complexities and costs.

**(3) Improved Metrics.** CP claims that it can improve NS's operating ratio, but this is irrelevant to the STB's review. Improved metrics can be achieved absent a merger, as demonstrated by CP's own record. Further, the dramatic reductions in NS's network and asset base that CP has proposed to improve NS's metrics might not be in the public interest. Such reductions could disenfranchise shippers by eliminating key service products; compromise CP+NS's ability to withstand operational or service disruptions; impair CP+NS's ability to sustain future traffic growth; and overall, impede the national interest in a robust transportation network.

On the other side of the ledger, the STB likely would find significant harms from the CP+NS merger. Most importantly, the proposed merger would trigger a final wave of industry consolidation. As noted above, this is an entirely new consideration in the STB's merger review. We strongly believe that the STB would be disinclined to allow railroads to merge down to just two transcontinental carriers, especially in the current climate where all of the large railroads are financially healthy, investing substantially in infrastructure, and providing generally good service.

Further, in our experience, rail mergers typically have resulted in substantial and lengthy service disruptions. The CP+NS merger would be no different. In fact, the proposed merger could create *multiple* stages of service disruptions – during the voting trust period, during merger implementation, during follow-on competitive responses to the merger, and during further industry consolidation.

Even if the STB were to approve the proposed merger, such approval should be expected to come with a huge price tag in the form of conditions. The merger review process provides the STB with the jurisdiction and authority to regulate carriers in ways that would otherwise exceed its authority. In addition to conditions regarding competition and potential further rail industry consolidation, the STB could impose other burdensome and expensive conditions.

**(1) Environmental Mitigation Conditions.** Since our tenures at the STB, community and environmental groups have become increasingly sophisticated and politicized. For example, several local municipalities in the suburbs of Chicago were successful in petitioning the STB for environmental and highway traffic congestion mitigation conditions in the CN/EJ&E transaction in 2008. In CN/EJ&E, total mitigation costs amounted to \$160 million – more than 50% of the transaction price; and STB oversight continues to this day – nearly 7 years after formal STB approval. CP+NS should expect similarly burdensome and

expensive environmental mitigation conditions, especially given their crude oil traffic volumes.

**(2) Labor Protection Conditions.** The STB would impose New York Dock labor protection, requiring payments to certain employees who lose their job as a result of the merger. If the reports we have read are correct, CP's Plan includes extensive headcount reductions, so labor protection benefits likely would represent a huge cost for CP+NS.

**(3) Service Conditions.** Given historical service problems from mergers, the STB might impose conditions related to service levels, such as the frequency with which cars will be delivered to and picked up from shippers, or other conditions to address shipper concerns. Such service conditions necessarily would threaten CP+NS's freedom to structure its operations.

## Conclusion

Current STB regulations set a high bar for approval of CP's proposed voting trust and merger based on an untested public interest standard. While no one can predict with absolute certainty what the STB will decide, we believe, based on our review of the public record, that the STB is unlikely to approve CP's proposed voting trust and the CP+NS merger.

/s/

/s/

**Francis P. Mulvey**

**Charles D. Nottingham**

### About Francis P. Mulvey

Dr. Mulvey has been President of ITER Associates, a transportation consulting firm in Bethesda, Maryland, since January 2014. Prior to assuming his current position, Dr. Mulvey served on the STB from 2004 to 2013. Dr. Mulvey served as Acting Chairman of the STB from March 2009 until August 2009, and he served as Vice Chairman of the STB from January 2012 to January 2013.

During his career, Dr. Mulvey has held various legislative positions, in which he was responsible for all railroad legislative matters for the Ranking Democratic Member of the Committee and served as advisor to the Ranking Member on overall transportation-policy issues.

### About Charles D. Nottingham

Mr. Nottingham served on the STB from 2006 to 2011. Mr. Nottingham served Chairman of the STB from August 2006 until March 2009, and he was designated Vice Chairman of the STB in January 2011.

During his career, Mr. Nottingham has worked closely with the freight rail, energy, agriculture, motor carrier, moving and storage, automotive and chemical industries.

### About Norfolk Southern

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### **Contacts:**

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Or

Joele Frank / Dan Katcher / Andrew Siegel  
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212-355-4449

## **Exhibit C**

Norfolk, Va. - Dec 08, 2015

## *Transaction Still Subject to Substantial Regulatory Risk and Highly Unlikely to be Approved*

### *Former STB Commissioners Determined That STB Unlikely to Approve Any Voting Trust*

Norfolk Southern Corporation (NYSE: NSC) ("the Company") today confirmed that it has received a revised, reduced proposal from Canadian Pacific (TSX:CP) (NYSE:CP).

Norfolk Southern noted that Canadian Pacific's revised, reduced proposal provides for a per share consideration of \$32.86 in cash and a fixed exchange ratio of 0.451 shares in a new company that would own Canadian Pacific and Norfolk Southern, and is valued at \$91.62 based on Canadian Pacific's closing price on December 7, 2015. The consideration offered in this revised proposal is less than the prior proposal, which the Norfolk Southern board unanimously determined was grossly inadequate, creates substantial regulatory risks and uncertainties that are highly unlikely to be overcome, and is not in the best interest of the Company and its shareholders.

On November 17, 2015, Canadian Pacific made an unsolicited proposal to acquire all the outstanding common shares of Norfolk Southern for \$46.72 in cash and a fixed exchange ratio of 0.348 shares in a new company that would own Canadian Pacific and Norfolk Southern. The total consideration of the initial proposal is valued at \$92.06 based on Canadian Pacific's closing price on December 7, 2015. Following careful consideration with the assistance of its independent financial and legal advisors, the Norfolk Southern board unanimously rejected the prior proposal.

"Canadian Pacific's revised, reduced proposal is not only less than what the Norfolk Southern board has already found to be grossly inadequate, it is even more uncertain and risky given the decrease in the cash consideration," said Chairman, President and CEO James A. Squires. "In addition to being grossly inadequate, the proposal is based on a voting trust structure that we reviewed and do not believe would be approved by the STB. Yesterday we released a white paper by two former STB chairmen who believe that the STB would not approve any voting trust structure because there is no basis to determine that it would be in the public interest."

On December 7, 2015 Norfolk Southern released a white paper by former Surface Transportation Board ("STB") commissioners Francis Mulvey and Charles Nottingham in which they carefully reviewed voting trust issues and the original merger transaction proposed by Canadian Pacific. The former commissioners concluded that, "As simple background, rail carriers cannot assume control of another carrier without prior STB approval. The STB's approval process can last between 19 and 22 months. Current STB regulations, adopted in 2001, set a high bar for approval of a proposed major merger and related voting trust based on an untested public interest standard. In our expert opinions, the STB is not likely to approve CP's proposed voting trust or the CP+NS merger."

Morgan Stanley & Co. LLC and Bank of America Merrill Lynch are acting as financial advisors to Norfolk Southern Corporation and Skadden, Arps, Slate, Meagher & Flom LLP, Hunton & Williams LLP and Morrison & Foerster LLP are acting as legal advisors.

#### About Norfolk Southern

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CONNECT



EMAIL UPDATES

## **Exhibit D**

EX-99.1 2 nsletter121415.htm LETTER



Norfolk Southern Corporation  
Three Commercial Place  
Norfolk, Virginia 23510-2191

December 14, 2015

Mr. E. Hunter Harrison  
Chief Executive Officer  
Canadian Pacific Railway  
7550 Ogden Dale Road S.E.  
Calgary, AB T2C 4X9  
Canada

Mr. Andrew F. Reardon  
Chairman of the Board  
Canadian Pacific Railway

Dear Mr. Reardon and Mr. Harrison:

Our board of directors has reviewed your revised, reduced proposal dated and received December 7. The consideration in that proposal has less overall value and cash than your prior proposal, which the board had determined to be grossly inadequate. Moreover, nothing in the revised, reduced proposal addresses the concerns of the Norfolk Southern board arising out of our extensive review of your prior proposal. These concerns were previously detailed in our December 4 letter to you and the related press release, including with respect to the substantial regulatory risks created by your proposal.

With respect to the unprecedented voting trust structure included in your revised proposal, contrary to your assertions that this is an improvement to your proposal, it was previously raised by you and was fully reviewed by the board. Based on the advice of regulatory experts, including former STB commissioners, we believe it is highly unlikely that any voting trust structure would be approved in connection with the proposed transaction, and that the STB would view the unprecedented structure proposed by you to result in premature control being exercised over Norfolk Southern.

Therefore, and after evaluating your December 7 proposal with the assistance of our financial, legal and regulatory advisors, it is the board's unanimous view that your proposal continues to be grossly inadequate, creates substantial regulatory risks and uncertainties that are highly unlikely to be overcome, and is not in the best interest of the Company and its shareholders.

Accordingly, the board unanimously rejects your revised, reduced proposal.

Sincerely,

/s/Jim Squires

Jim Squires  
Chairman, President and  
Chief Executive Officer

/s/Steven Leer

Steven Leer  
Lead Independent Director

## **Exhibit E**



# CP responds to Norfolk Southern white paper

December 15, 2015 / Calgary, AB

Canadian Pacific (TSX:CP)(NYSE:CP) today responded to Norfolk Southern's December 7, 2015 white paper. The full text of CP's white paper is below.

On December 7, 2015, the Norfolk Southern Corporation ("NS") posted to its website a "white paper" authored by Chip Nottingham and Frank Mulvey, two former Surface Transportation Board ("STB") members retained by NS. In the white paper, Mulvey and Nottingham explain why they think a CP+NS merger and related voting trust would have difficulty gaining regulatory approval. It is important to note that neither Mulvey nor Nottingham participated in the review of a "major" merger transaction while at the STB and did not consult with CP to ascertain the details of what CP is proposing or might propose before publishing their white paper. In fact, Nottingham and Mulvey assumed for the purpose of their analysis that NS would be put in trust when in fact CP intends for CP to be in trust rather than NS. Their white paper was published before CP delivered its detailed presentation describing the key features of the proposed merger and related voting trust including our proposal to put CP in trust. As such, their white paper is based largely on inaccurate assumptions, rumor, speculation, and conclusions that are unsupported by fact or by law.

We would not presume to predict the conclusion of the current STB. We are, however, confident that the STB will not prejudge the transaction, and that whatever voting trust structure and merger application is ultimately presented to the STB for regulatory approval will be considered fairly and impartially by the current STB, with the benefit of a full record and under the proper legal standards.<sup>[1]</sup>

Mulvey and Nottingham make four primary assertions: [1] that a voting trust cannot be used as proposed; [2] that the STB would not approve a voting trust or a CP+NS merger application due to its concerns that it will trigger other mergers; [3] that the STB would not approve a CP+NS merger application under its public interest standard; and [4] that, if it approved such a transaction, it would be subject to "onerous" conditions. We explain below why their conclusions are wrong.

In preparing this response, we have been advised by Stinson Leonard Street, LLP, which is nationally recognized for its rail regulatory practice. The firm supports the analyses and conclusions set forth below.

## ***1. Use of a voting trust to protect and enhance the value of NS pending regulatory approval is lawful and in the public interest***

Voting trusts have long been held to be an effective and lawful means of insulating a carrier from unlawful control pending regulatory approval.<sup>[2]</sup> They have and continue to be a common feature of rail transactions.<sup>[3]</sup> Such trusts are crucial to the proper functioning of the market, and can provide other important public benefits. As may be the case here, use of a voting trust can be the determinative factor in whether a transaction occurs as it enables the target carrier's stockholders to receive consideration prior to regulatory approval and substantially reduces the target carrier's exposure to regulatory risk.<sup>[4]</sup> Thus, denial of the use of a voting trust would interfere with the market place, restricting stockholder's ability to realize the full value of their investment. Such intrusive regulatory action would represent a marked departure from STB precedent and policy, and would be inconsistent with its statutory mandate.<sup>[5]</sup>

### ***The law and regulations governing use of voting trusts have not changed***

Importantly, and contrary to Mulvey and Nottingham's assertions that "voting trust regulations have become far more stringent," the STB has not changed, much less made more restrictive, the governing principles for evaluating voting trusts. Rather than adopting comprehensive mandatory regulations, the STB opted to maintain its limited guidelines related to independence and irrevocability<sup>[6]</sup> as the minimal regulatory approach needed to prevent abuse consistent with the principal statutory objectives of maximizing competition and minimizing the need for federal regulatory control over the rail transportation system.<sup>[7]</sup>

While the 2001 new merger rules impose a procedural requirement that applicants in a "major" transaction seek pre-approval for the use of a trust, they do not overturn the long-standing practice of determining whether the public benefits of using a trust outweigh the risk of improper usage of voting trusts.<sup>[8]</sup> If anything, the pre-approval procedure reduces the risk that trusts will be used improperly because the STB can make adjustments if and as needed, prior to implementation.<sup>[9]</sup>

### ***The STB should rule expeditiously on the use of a voting trust***

The STB's rules provide for decision on use of a voting trust after a "brief" notice and comment period. Precedent suggests that the Board would act expeditiously and rule on a voting trust petition within two or three months of a petition.<sup>[10]</sup>

### ***Management changes do not constitute unlawful control***

Contrary to what Mulvey and Nottingham assumed, CP contemplates that the CP operating entities would be placed in a voting trust. Mr. Harrison would sever ties with CP and be hired as CEO at NS. Pending regulatory approval, CP and NS would continue to operate as independent carriers. Neither Mr. Harrison nor the CP holding company would exercise any control over the carrier in trust. At NS, Mr. Harrison would follow the same roadmap used at Illinois Central ("IC"), Canadian National ("CN"), and CP to dramatically improve operating efficiencies and service, making NS more competitive and increasing its value.

In prior precedent, the ICC (the STB's predecessor) allowed management changes between the trust and non-trust companies, explaining that such changes between carriers would not be subject to regulatory approval in the ordinary course of business, and that restricting such changes would be inconsistent with its minimalist regulatory approach. When concerns have been raised about independence, the ICC has exercised its conditioning authority and relied on its oversight ability to address concerns and to ensure compliance, rejecting intrusive regulatory interference with personnel decisions.<sup>[11]</sup>

### ***Management changes are consistent with the public interest***

A properly established voting trust has long been recognized as a permissible means of changing management so that the public can obtain the benefits of more efficient operations.<sup>[12]</sup> The highly-successful CN-IC merger in which Mr. Harrison moved from the carrier that was put in trust (IC) to the non-trust carrier (CN) is a highly relevant example of how the STB has permitted management change during the merger approval period.<sup>[13]</sup>

Contrary to the claim that "the public interest standard is completely new," and thus allegedly uncertain, the new regulations follow, as they must, the same public interest standard set by the statute that has been used for decades.<sup>[14]</sup> The public interest standard is met by a showing that the public will gain sufficient benefits from the arrangement to warrant its approval.<sup>[15]</sup>

In applying the public interest standard, the Board's primary concern is with the risk of financial harm in the event regulatory authority is denied and the carrier must be disgorged.<sup>[16]</sup> We are confident of our ability to demonstrate that the risk of financial harm is low. CP is already running extremely well having achieved enormous operating improvements under Mr. Harrison and Mr. Creel's leadership. In our proposed transaction, Mr. Harrison would leave CP approximately one year earlier than contemplated in his employment contract, making a clean break with CP, to run NS. Other than Mr. Harrison, CP's management team would remain intact and is expected to continue to make substantial progress under Mr. Creel and the leadership team while it is held

in trust for likely less than 18 months. Under Mr. Harrison's management, we expect that NS's operations will materially improve. Rather than cause financial harm, we believe that the use of a trust for CP and the transfer of Mr. Harrison to become CEO of NS will vastly improve the operations and value of both railroads.<sup>[17]</sup>

**2. Hypothetical downstream merger effects are not a basis for rejecting a merger that is in the public interest**

The STB has a long-standing rule of considering only the application actually before it. Although the new merger rules now require applicants to discuss potential impacts of future hypothetical mergers in anticipation of a final round of consolidation, the stated purpose is to help the STB "initiate a commentary" that would allow the Board "to develop a consistent set of principles for analyzing all of the applications that could be brought to us in such a final round of mergers."<sup>[18]</sup>

Mulvey and Nottingham do not explain why it would be reasonable, or lawful, for the STB to deny a merger that is in the public interest just because other carriers might propose mergers that are not in the public interest. We are confident the STB would not do so. The STB may, of course, deny subsequent merger proposals if and when any such mergers are proposed if they are not in the public interest.

Further, the STB has a statutory obligation to consider whether a merger application is in the public interest, and to do so based on a full record and in accordance with their own rules and procedures.<sup>[19]</sup> Mulvey and Nottingham speculate that the current STB would reject a proposed voting trust in a bid to deter any future Class I mergers. In other words, the STB would make a determination that no Class I merger is in the public interest, and would do so prior to the filing of a primary application and before considering any evidence. Such action would be a clear abrogation of the STB's legal obligations. Moreover, the Merger Rules Decision adopts no presumptions or bias against future Class I mergers and was not pre-judging the merits of any future merger proposals.<sup>[20]</sup>

Significantly, as reflected in the table below, a CP+NS merger does not create a dominant carrier that would necessitate a reflexive merger in response. Rather, CP+NS would be better able to compete with the other large carriers. In this way, the merger adds competitive balance to the industry, making the industry more competitive as a whole. It also improves capacity around Chicago, alleviating a key source of pressure on other carriers to merge.

Comparison of Class I Carriers<sup>[21]</sup>

2014	UP	BNSF	CP+NS	CSX	CN
Revenue (MM)	\$23,988	\$23,239	\$17,624	\$12,699	\$11,031
Route Miles	31,974	32,754	33,759	20,769	20,000
Employees	47,201	48,000	44,035	31,500	24,635
RTMs (MM)	549,629	711,321	355,967	246,237	232,138
GTMs (MM)	1,014,905	1,326,098	694,299	482,729	448,765

**3. We are confident in our belief that the merger meets the STB's standard**

The "public interest" standard test in the new merger rules balances anti-competitive harm, risk of service disruption and other merger-related harm against the public benefits. Applicants must show that "substantial and demonstrable gains in important public benefits — such as improved service and safety, enhanced competition and greater economic efficiency — outweigh any anticompetitive effects, potential service disruptions, or other merger-related harms."<sup>[22]</sup> Further, applicants can tip the scale in favor of the public

interest by proposing competitive enhancements.[23] On its merits, we are confident that a CP+NS merger easily satisfies the STB standard. The proposed innovative competition enhancements assure a balance in the public interest.

### ***No potential competitive harm***

Notably, Mulvey and Nottingham identify no anti-competitive harm from this proposed end-to-end merger because there is in fact no such harm. To the extent that any such potential harm is identified, it would be addressed and outweighed by the proposed competitive enhancements. [24]

### ***Low risk of service disruption***

Mulvey and Nottingham's suggestion that merger-related service disruption is inevitable is not supported by the most relevant precedent – the highly successful CN-IC merger. Mr. Harrison moved to CN from the IC while the IC was in trust. The operational improvements at CN, directed by Mr. Harrison and CN management, were to the substantial benefit of CN and the public during the pendency of the trust and thereafter, and were not contingent on the ultimate regulatory outcome. Those operational changes helped ensure a smooth integration once STB approval was obtained. In fact, the merger was so successful that the STB terminated its five-year oversight period after just two years, noting the lack of service issues.[25]

Moreover, the STB expressly rejected the suggestion that it has adopted a presumption that merger-related service disruptions are inevitable.[26] Further, the STB specifically contemplates that applicants can offset any risk by offering enhanced competition proposals, which CP would do.

### ***No other-merger related harms***

Mulvey and Nottingham also reference more nebulous "other merger-related harms." In an attempt to substantiate this claim, Mulvey and Nottingham focus almost entirely on the possibility that other carriers will seek to merge in response to a CP-NS merger. But as noted above, potential downstream mergers are not part of the STB's "public interest considerations" and should not be a basis for denying a merger that is in the public interest. We do not believe that there are other merger-related harms.

### ***Substantial and demonstrable public benefits***

On the public benefits side of the equation, Mulvey and Nottingham ignore the many public benefits that the STB has previously found to be important, including more efficient single line service, reduced costs and improved asset utilization, opening new domestic and global markets to customers, reduced fuel consumption, reduced highway congestion, improved environmental impacts and enhanced competition. All of these benefits and more would be demonstrably and substantially present in the CP+NS combination.

### ***Alleviating pressure on Chicago benefits everyone***

One important benefit is the impact on Chicago, the most important rail transportation hub in North America. As noted by CP management with extensive railroad operations experience (compared to the two former STB Board members retained by NS who have no such experience), there are material opportunities to reroute CP+NS traffic away from or around Chicago, but that is only part of the picture. A merger opens up opportunities to interchange traffic with other carriers at alternative gateways, as well as streamline traffic that will continue to route through Chicago. These routing changes would free up needed capacity in Chicago and result in a more robust, resilient and competitive rail transportation system.

### ***Improved metrics means delivering superior service at a lower cost***

Promoting efficient operations and management are at the core of the public interest, and a central tenant of both national rail policy and the economic principles underlying rail regulation. In fact, the STB's merger standards expressly identify "greater economic efficiency" as an "important public benefit." [27] Improved metrics, such as increased train speeds, lengths and weight, lower operating costs, and better on time

performance, create additional capacity, strengthen the network, and enhance a carrier's ability to compete and to avoid and recover from future service disruptions in both the short and long terms. Greater economic efficiency strengthens competition by enabling a carrier to offer superior service at a lower cost.

Mr. Harrison has repeatedly demonstrated that greater efficiency can be achieved on a sustained basis and results in a stronger and more competitive carrier. The two highest performing Class I carriers today, CN and CP are proof positive that the changes Mr. Harrison would make at NS would be good for NS, for its customers, and for the industry.

### ***Substantial public benefits can be achieved only through a merger***

While a substantial amount of improvements can be made to NS on a stand-alone basis (provided that the right management is in place), a merger would allow for additional material improvements that would demonstrably and substantially benefit the combined CP+NS network as well as the rest of the rail network. They include efficiencies from transcontinental single-line service, greater routing flexibility including the ability to avoid Chicago, and greater interchange flexibility with other carriers.<sup>[28]</sup> Those broader efficiencies can only be achieved in the context of a merger.

Far from degrading service, CP+NS would be able to offer shippers new and enhanced service products including safe, reliable, efficient single-line service that connects CP+NS customers to domestic and global markets.

### ***Enhanced competition***

Standing alone, a CP+NS merger is in the public interest; the proposed competitive enhancements should "assure" it.

Mulvey and Nottingham state incorrectly that CP is proposing "open access" which they say will be operationally disruptive and costly. CP is not proposing "open access." CP is proposing modified terminal access which would allow another carrier to operate over CP+NS lines to serve a customer if the customer is not receiving adequate service or is being charged an unreasonable rate. CP is also proposing ending the bottleneck pricing approach, allowing customers to obtain a separately challengeable rate to the customer's preferred interchange location.<sup>[29]</sup>

Importantly, CP's proposed competitive enhancements would be neither disruptive nor costly. Rather, they would heighten competition which, according to Congress and the STB, is a virtue. A principal objective of the national rail policy states that it is the U.S. government's policy "to allow to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail."<sup>[30]</sup> The STB review of the transaction is governed by that policy.<sup>[31]</sup>

Moreover, an efficient carrier, as CP+NS would be, would have nothing to fear from competition. CP and CN are subject to forced inter-switching in Canada, and yet, they are the two most efficient carriers in the industry today, demonstrating that a low-cost, service-focused carrier can increase revenues, operate efficiently, and reinvest in infrastructure in a competitive environment.

### ***The STB may not take the full statutory time period to review the merger***

In setting the procedural schedule for merger review, the STB seeks to provide sufficient time "to produce a complete, thorough decision, to which all parties have had an adequate opportunity to contribute, as expeditiously as possible."<sup>[32]</sup> So, while the law allows a generous maximum of 16 months from the filing and acceptance of the application to a decision, the STB has consistently processed major merger reviews in a shorter period of time.<sup>[33]</sup> CN/IC and BN/SF were each approved 10 months from the filing of the respective primary applications. Even the Conrail/CSX/NS review, which involved a fundamental restructuring of rail competition east of the Mississippi, was decided in 395 days. The STB's policy or rationale towards processing merger applications expeditiously has not changed in the interim. Accordingly, we think it possible that the STB would seek to resolve a CP+NS application in fewer than the statutory maximum 16 months from filing of the primary application.

In reaching this conclusion, we are mindful of the fact that this would be the first "major" transaction reviewed since 1999 and the first under the new merger rules. Nevertheless, we do not believe that the STB would want to or need to use the statutory maximums. We are also aware that some believe that the STB lacks staff resources and merger experience necessary to expedite consideration. The STB staff, however, is capable, experienced in reviewing and analyzing mergers and related issues, and has a slightly higher headcount than when it reviewed the Conrail/CSX/NS and CN-IC transactions.[34] Lastly, we are aware that the environmental review process in a merger can be lengthy, and can delay a final STB decision. However, we are aware of no reasonable basis at this time on which to expect a lengthy environmental review.

#### **4. Potential conditions would not be onerous**

The proposed competitive enhancements obviate the need for any service conditions. As to employee protection, [35] since CP anticipates that headcount reductions attributable to the transaction would be achieved through attrition, CP+NS would not incur significant costs under the STB's standard employee protective conditions that Mulvey and Nottingham acknowledge would apply.

We do not agree with Mulvey and Nottingham's speculation that imposition of onerous environmental conditions is likely. Mulvey and Nottingham cite the heavily conditioned CN-EJ&E merger experience.[36] However, that merger involved a very different transaction and circumstance. The EJ&E was a small railroad with pre-existing environmental problems such as blocked crossings, train noise and safety risks. CN's acquisition and plans to integrate it into "the very heart of the [CN] system," changed "the character" of the line and would have significantly exacerbated these pre-existing problems.[37] By contrast, CP+NS are both Class I carriers and the merger would not change the character of their rail lines. Accordingly, speculation that onerous conditions would be imposed is unfounded.

Moreover, this is an environmentally friendly merger that should result in capacity improvements through efficiencies rather than construction. More efficient operations including new single line service will reduce fuel consumption. More competitive service will take trucks off highways, reducing congestion. That said, CP expects that environmental conditions, as well as other conditions, will either be mandated or agreed to voluntarily as in past transactions, but we do not expect those conditions to materially impair the transaction's value.

If the STB were to impose onerous conditions, CP can opt not to consummate the transaction and to divest CP or NS. In that scenario, because of the value added improvements made to NS during regulatory review, CP, NS, shareholders and shippers will still be better off than under NS's standalone plan.

#### **About Canadian Pacific**

Canadian Pacific (TSX:CP)(NYSE:CP) is a transcontinental railway in Canada and the United States with direct links to eight major ports, including Vancouver and Montreal, providing North American customers a competitive rail service with access to key markets in every corner of the globe. CP is growing with its customers, offering a suite of freight transportation services, logistics solutions and supply chain expertise. Visit [cpr.ca](http://cpr.ca) to see the rail advantages of Canadian Pacific.

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[1] 49 U.S.C. §10101(2) ("In regulating the railroad industry, it is the policy of the United States Government— \* \* \*(2) . . . to require fair and expeditious regulatory decisions when regulation is required").

[2] See, e.g., *Water Transport Ass'n v. ICC*, 715 F.2d 581, 582 (D.C. Cir. 1983) (noting that the "ICC has long permitted carriers" to use independent voting trusts in merger situations "because the acquiring carrier does not 'control' the acquired carrier").

[3] E.g., *Genesee & Wyoming Inc.—Control—Railamerica, Inc.* Decision No. 5, STB Finance Docket No. 35654 (served Dec. 20, 2012); *Canadian Pacific Ry. Co.—Control—Dakota, Minn. & E. RR Corp.*, Decision No. 11, STB Finance Docket No. 35081 (served Sept. 29, 2008).

[4] E.g., *Water Transport Ass'n*, 715 F.2d at 786 (noting voting trusts are "common acquisition device" that if disallowed "would force railroads to use less desirable alternative means if they could, and foreclose acquisition entirely if it could not be made by purchase contract").

[5] See 49 U.S.C. §§ 10101(1) and (2) ("(1) to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail; (2) to minimize the need for Federal regulatory control over the rail transportation system").

[6] 49 CFR §§ 1013.1 and 1013.2.

[7] See generally Voting Trust Rules, 44 Fed. Reg. 59908, 59909/1 (ICC Oct. 17, 1979) ("Instead of comprehensive mandatory regulations, we are adopting guidelines governing the provisions of voting trust agreements which concern the independence of the trustee and the irrevocability of the trust. The guidelines are intended to inform the public of the provisions which should be included in a voting trust agreement to insure that it is not used to obtain unauthorized control of a regulated carrier.").

[8] See *Gilbertville Trucking Co. v. United States*, 371 U.S. 115, 128 (1962) (noting that even where a statutory control violation exists, merger may be approved "upon consideration of all the facts, [if] it clearly appears that the public interest will be best served by such approval") (citations omitted); see also Voting Trust Rules, 44 Fed. Reg. at 59909/1 ("the Commission has granted approval of the application in spite of violations involving improper usage of voting trust because the benefits to the public were found to outweigh the harm resulting from the violations") (citations omitted).

[9] *Ill. Cent. Corp.—Common Control—Ill. Cent. Railroad Co. & the Kansas City S. Ry. Co.*, STB Finance Docket No. 32556 (served Oct. 21, 1994) (seeking comments on proposed voting trust and possible conditions).

[10] E.g., *id.* (establishing a 35-day briefing schedule regarding the proposed voting trust structure).

[11] See *Santa Fe Southern Pacific Corporation-Control-Southern Pacific Transportation Co.: Merger-The Atchison, Topeka And Santa Fe Railway Company And Southern Pacific Transportation Company*, 1983 ICC LEXIS 70 (Dec. 22, 1983) (noting that "under normal circumstances" the ICC "would be powerless to prevent" movement of managers, but conditioning managers' move to prevent use of information to obtain a competitive advantage or to participate in management decisions affecting the competitive relationship).

[12] *E.g., Eastern Freight Ways, Inc. – Investigation of Control – Associated Transport, Inc.*, 122 MCC 143, 153 (1975) (noting that "allow[ing] large publicly held carriers to be bought out through the use of properly established independent voting trusts . . . [means that] ineffectual management can be removed, and adequate transportation can be assured to the public").

[13] See *Canadian Nat'l Ry. Co.—Control—Ill. Cent. Ry. Co.*, 4 STB 122 (1999) ("CN-IC Decision").

[14] Major Rail Consolidation Procedures, STB Ex Parte No. 582 (Sub-No. 1), at 13 (served June 11, 2001) ("Merger Rules Decision") ("we retain in general the traditional balancing test that has always governed our determination of whether mergers are consistent with the public interest"); *e.g., Penn-Central Merger and N & W Inclusion Cases*, 389 U.S. 486, 499 (1968); *Missouri-Kansas-Texas R. Co. v. United States*, 632 F.2d 392, 395 (5th Cir. 1980), *cert. denied*, 451 U.S. 1017 (1981) ("[t]he Act's single and essential standard of approval is that the [Board] find the [transaction] to be 'consistent with the public interest'" (citation omitted)).

[15] See, *e.g., Gilbertville Trucking Co.*, 371 U.S. 115, 127 (1962); *Lamoille Valley R. Co. v. ICC*, 711 F.2d 295, 330 (D.C. Cir. 1983) (independent control "is simply a factor in the Commission's overall decision whether a merger is in the public interest") (citation omitted). CN-IC Decision, 4 STB at 139 ("In determining the public interest, we balance the benefits of the merger against any harm to competition, essential service(s), labor, and the environment that cannot be mitigated with conditions").

[16] Merger Rules Decision, at 29. In the event that the trust carrier must be disgorged, the STB would allow as much time as necessary to ensure an orderly divestiture process. Two years is common, but the STB would allow longer if necessary. See, *e.g., Santa Fe S. Pacific Corp.-Control-S. Pacific Transp. Co.*, 2 I.C.C. 2d 709, 835-36 (July 30, 1987) (SFSP's "offer to sell SPT within two years (as stated in the Voting Trust Agreement) does not override the public interest. SFSP may of course sell the ATSF instead, or it may take longer than two years to sell SPT, if it becomes necessary").

[17] See *Eastern Freight Ways, Inc.*, 122 MCC at 157-58 ("Eastern has been a successful, well-financed carrier which has in the past taken over failing carriers and made them profitable. . . . It now certainly appears capable, especially based on its past successes, of making the Associated operations profitable again while giving improved service to the public. The operating rights of the two carriers are compatible and will allow more beneficial service to the public by use of a combined and coordinated Eastern-Associated system able to serve most of the Northeast, and permit operations with greater economies to the carriers involved").

[18] Merger Rules Decision at 44.

[19] 49 U.S.C. §10101(2) ("In regulating the railroad industry, it is the policy of the United States Government— \* \* (2) . . . to require fair and expeditious regulatory decisions when regulation is required"); 49 U.S.C. § 11324(c) ("The Board shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest.").

[20] See Merger Rules Decision at 12-13.

[21] Based on data reported in each carrier's R-1 Report to the STB and Annual Report.

[22] 49 CFR § 1180.1(c).

[23] *Id.*

[24] See, *e.g., Union Pacific Corp.—Control and Merger—S. Pacific Ry. Corp.*, 1 STB 233, 375 (1996) ("UP-SP Decision") ("In sum, the merger benefits here outweigh any competitive harms of the transaction, and the public interest requires that we approve it. The conditions we are imposing will effectively mitigate the competitive harms of the merger, while preserving its benefits").

[25] *Canadian National Railway Company, Grand Trunk Corporation, And Grand Trunk Western Railroad Incorporated — Control — Illinois Central Corporation, Illinois Central Railroad Company, Chicago, Central And Pacific Railroad Company, And Cedar River Railroad Company*, STB Finance Docket No. 33556, Decision No. 4 (Dec. 27, 2001) ("Our oversight during the first and second years has revealed no significant problems following implementation of the CN/IC merger. We are therefore concluding our formal oversight process in the CN/IC merger proceeding").

[26] See Merger Rules Decision at 13.

[27] *E.g.*, 49 C.F.R. § 1180.1(c)(1) ("mergers can generate important public benefits such as improved service, more competition, and *greater economic efficiency*") (emphasis added).

[28] See Merger Rules Decision at 18 (noting "other benefits that can be achieved through mergers in terms of creating single-line service and other efficiencies that can improve rail service and lower rail costs and thus make merging railroads more competitive and more responsive to their customers").

[29] The proposals are consistent with the type of competitive enhancements that the STB has found would offset "merger-related harms that cannot be directly or effectively mitigated." Merger Rules Decision at 10.

[30] 49 USC § 10101(1).

[31] See 49 CFR § 1180.1(b).

[32] *BN/SF*, Finance Docket No. 32549, Decision No. 4 at \*2 (Oct. 5, 1994) (emphasis added).

[33] *Id.* ("Since the enactment of the maximum statutory time periods nearly 20 years ago, we have repeatedly demonstrated that proceedings such this one can be completed much more promptly").

[34] Compare "STB FY 1998/1999/2000/2001 Report" at Appendix B (Sept. 20, 2002)(131 Average FTE in 1999) with "STB FY 2013 Report at Appendix B (June 2, 2015)(136 Average FTE in 2013).

[35] We anticipate that the Board would impose the *New York Dock* employee protective conditions in this transaction.

[36] *Canadian Nat'l Ry. – Control – EJ&E W. Co.*, STB Finance Docket No. 35087 (served Dec. 24, 2008).

[37] *Id.*, slip op. at 46.

## **Exhibit F**

## News

SHARE   

Norfolk, Va. - Dec 23, 2015

Norfolk Southern Corporation (NYSE: NSC) ("the Company") today announced that its board of directors has unanimously rejected Canadian Pacific's (TSX:CP) (NYSE:CP) Dec. 16, 2015, publicly disclosed, revised proposal to acquire the Company for \$32.86 in cash, a fixed exchange ratio of 0.451 shares in a new company that would own Canadian Pacific and Norfolk Southern, and 0.451 of a Contingent Value Right.

The following is the text of the letter that was sent on Dec. 23, 2015, to Canadian Pacific's Chief Executive Officer, E. Hunter Harrison, and its Chairman of the Board, Andrew F. Reardon.

December 23, 2015

Mr. E. Hunter Harrison  
Chief Executive Officer  
Canadian Pacific Railway  
7550 Ogden Dale Road S.E.  
Calgary, AB T2C 4X9  
Canada

Mr. Andrew F. Reardon  
Chairman of the Board  
Canadian Pacific Railway

Dear Mr. Reardon and Mr. Harrison:

The board of directors of Norfolk Southern has carefully reviewed your latest revised proposal, which you publicly disclosed on December 16, but have not otherwise communicated to us. That review was conducted with the assistance of our independent financial, legal and regulatory advisors. In its review, the board noted that the only change from your prior proposal was to include a Contingent Value Right ("CVR").

The board of Norfolk Southern has unanimously determined that your latest revised proposal is grossly inadequate, creates substantial regulatory risks and uncertainties that are highly unlikely to be overcome, and is not in the best interest of the Company and its shareholders. This would be the case even if the CVR had a value at the high end of the range suggested in your publicly filed presentation. In fact, our financial advisors believe that the CVR would trade at a significant discount.

In addition, you have not addressed the significant regulatory issues that we have previously identified. We do not believe that your voting trust structure would be approved. As you know, our view reflects careful analysis by our regulatory experts and is fully supported by two former Surface Transportation Board ("STB") Commissioners. You have a path to seek a declaratory order from the STB as to whether the voting trust structure that you proposed could work. The STB has clear, statutorily-established authority to issue declaratory orders to remove uncertainty, and there is precedent for it in the voting trust context. No involvement by Norfolk Southern is required for you to seek a declaratory order regarding the legality of putting Canadian Pacific into a voting trust under your proposed structure. Your decision not to seek an order shows a lack of confidence in your proposed structure.

You continue to publicly declare that we are not "engaging" or "meeting" with you. There is no basis to meet until you both make a compelling offer and address the regulatory issues, which you have the ability to do by seeking a

declaratory order. We also note your repeated public statements that you are not willing to increase your offer regardless of whether we were to meet.

The Norfolk Southern board of directors is focused on protecting the interests of our shareholders. It would be inconsistent with the duties of the board to pursue a risky and uncertain offer that substantially undervalues the Company. Accordingly, the board of directors has unanimously rejected your latest revised proposal.

Sincerely,

/S/

Jim Squires  
Chairman, President and  
Chief Executive Officer

/S/

Steven Leer  
Lead Director

Morgan Stanley & Co. LLC and Bank of America Merrill Lynch are acting as financial advisors to Norfolk Southern Corporation and Skadden, Arps, Slate, Meagher & Flom LLP, Hunton & Williams LLP and Morrison & Foerster LLP are acting as legal advisors.

#### **About Norfolk Southern**

Norfolk Southern Corporation (NYSE: NSC) is one of the nation's premier transportation companies. Its Norfolk Southern Railway Company subsidiary operates approximately 20,000 route miles in 22 states and the District of Columbia, serves every major container port in the eastern United States, and provides efficient connections to other rail carriers. Norfolk Southern operates the most extensive intermodal network in the East and is a major transporter of coal, automotive, and industrial products.

#### **Forward-Looking Statements**

Certain statements in this press release are forward-looking statements within the meaning of the safe harbor provision of the Private Securities Litigation Reform Act of 1995, as amended, including but not limited to statements regarding the indication of interest made by Canadian Pacific Railway Limited. In some cases, forward-looking statements may be identified by the use of words like "believe," "expect," "anticipate," "estimate," "plan," "consider," "project," and similar references to the future. Forward-looking statements are made as of the date they were first issued and reflect the good-faith evaluation of the Company's management of information currently available. These forward-looking statements are subject to a number of risks and uncertainties, many of which are beyond the Company's control, including future actions that may be taken by Canadian Pacific Railway Limited in furtherance of its unsolicited proposal. These and other important factors, including those discussed under "Risk Factors" in the Company's Form 10-K for the year ended December 31, 2014, as well as the Company's other public filings with the SEC, may cause our actual results, performance or achievement to differ materially from those expressed or implied by these forward-looking statements. Forward-looking statements are not, and should not be relied upon as, a guarantee of future performance or results, nor will they necessarily prove to be accurate indications of the times at or by which any such performance or results will be achieved. As a result, actual outcomes and results may differ materially from those expressed in forward-looking statements. We undertake no obligation to update or revise forward-looking statements, whether as a result of new information, the occurrence of certain events or otherwise, unless otherwise required by applicable securities law.

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## FEATURED MEDIA

## **Exhibit G**

DATE PUBLISHED: FEBRUARY 10, 1998

## Canadian National To Acquire Illinois Central In Strategic Combination Valued At US\$3 Billion

CN Forges Integrated North American Rail Network



MONTREAL and CHICAGO, Feb. 10 /PRNewswire/ -- Canadian National Railway Company ("CN")(NYSE: CNI, TSE/ME: CNR) and Illinois Central Corporation (NYSE: IC)("IC") announced today that the companies have entered into a definitive merger agreement under which CN will acquire all of the common stock of IC for a combination of cash and stock valued at US\$39.00 per IC share. IC has approximately 61.4 million shares outstanding, giving the transaction a total equity value of approximately US\$2.4 billion. Upon completion of the merger, CN will also assume IC's net debt of approximately US\$560 million. The transaction is expected to be accretive to CN's earnings and cash flow per share in the first year following Surface Transportation Board (STB) approval, and increasingly accretive thereafter.

Under the terms of the agreement, which has been unanimously approved by both companies' Boards of Directors, CN will promptly commence a cash tender offer for approximately 46.1 million shares of IC common stock, representing approximately 75 percent of the outstanding IC common stock at a price of US\$39.00 per IC share. This represents a premium of 17.8 percent over the US\$33.12 average closing price of IC stock for the 30-calendar day period ended February 9, 1998. The tender offer is subject to a minimum tender condition of 50.1 percent of the fully diluted IC common shares being validly tendered and not withdrawn. The tender offer will be subject to receipt of

informal STB staff approval of a required voting trust agreement and the satisfaction of other customary conditions. The shares purchased in the tender offer will be placed in the voting trust.

Following completion of the tender offer, CN will consummate a second-step merger in which the remaining IC shares will be exchanged for cash and CN shares at a value equal to the same cash price paid in the tender offer, subject to certain collar arrangements. The CN shares will be issued in the merger with respect to 25 percent of the IC common stock. The merger is subject to, among other things, approval by IC shareholders and other customary conditions. After the merger, all of IC's stock will be held in the voting trust. Neither the acquisition of the IC shares pursuant to the tender offer nor the merger will be subject to STB approval of the combination. The transaction will be accounted for as a purchase and will be taxable to IC shareholders. Final regulatory approval is expected in early 1999.

David McLean will remain Chairman of the Board of Canadian National and Paul M. Tellier will remain President and Chief Executive Officer of CN. E. Hunter Harrison, President and Chief Executive Officer of Illinois Central, will become Chief Operating Officer of CN effective upon completion of the tender offer. Two IC directors, Gilbert H. Lamphere, Chairman of the Board of Illinois Central, and Alexander P. Lynch, will join the CN Board of Directors, which will expand to 15 members. Messrs. Harrison, Lamphere and Lynch have each agreed to make a significant equity investment in CN. Furthermore, it is anticipated that the IC employee stock options outstanding at the time of the merger will be converted into an equal value of CN employee stock options.

Canadian National, Canada's largest and only transcontinental railway, has made significant strides since it was privatized in 1995 and posted record earnings in 1996 and 1997. CN's reported revenue rose 15 percent between 1992 and 1997. Revenue in 1997 was CDN\$4.4 billion (US\$3.0 billion). CN's operating ratio improved by approximately 16 points over this period to 78.6 percent (U.S. GAAP) in 1997. CN reaches the key U.S. cities of Detroit and Chicago. Illinois Central, with 1997 revenues of approximately \$700 million, has operations extending from the rail hub of Chicago, south to the Gulf of Mexico, and west through Iowa. Based upon its 62.3 percent operating ratio, IC is the most efficient U.S. Class I railroad. Operating ratio (operating expenses as a percentage of revenues) is the freight railroad industry's standard efficiency measure.

With headquarters in Montreal, Canadian National after the merger will be the fifth largest railway in North America based on 1997 annual revenues of CDN\$5.3 billion (US\$3.7 billion). CN will have approximately 18,700 route miles in Canada and the U.S. and 24,600 employees.

"This combination is about growth. It's a perfect fit of two complementary lines providing a three-coast strategy from the Atlantic to the Pacific to the Gulf of Mexico," said Paul Tellier, President and Chief Executive Officer of CN. "Together, we will provide unparalleled competitive service to shippers throughout the continent that neither railroad could offer on its own. CN and IC will offer customers broader market reach, complementary route structures and superior customer service driven by a

mutual desire to meet customers' needs."

Mr. Tellier continued, "The combined system will create extensive, new single-line service routes between North-South markets that are expected to result in more frequent and reliable service. Improved facility and equipment supply and utilization will result in greater productivity through reduced car handling, faster train assembly and increased railcar availability. It will also allow shippers to better manage traffic, reduce customer logistics costs and enhance their competitive positions. It is our goal to attract shippers from the heavily congested highways and urban centers by the quality of service offered by the combined company.

"A combined CN and IC will create new revenue opportunities, new efficiencies and new avenues for shareholder growth. IC has a direct North-South network that can be easily integrated into the East-West CN. Together, we will be able to make effective use of capital resources to create new investment opportunities," said Mr. Tellier.

The combined strengths of CN and IC include:

- A seamless North-South network from all major markets in Canada through Chicago and Detroit to the Gulf of Mexico, positioning CN along a rapidly growing trade corridor which had 1997 annual rail revenues of over \$5 billion;
- The ability to capitalize on the liberalization of trade among Canada, the United States and Mexico, which is growing annually at double-digit rates;
- A broader array of rail service options in key North-South traffic lanes;
- Expedited, more reliable and more efficient single line service that will free up assets, increase rail car availability and reduce switching between the two railways;
- Enhanced competition at all points served by the combined rail network including new port options for shippers;
- Improved opportunities for diverting traffic from highways between Southwest Ontario, the Midwest and beyond by improving CN's intermodal network;
- Reduced reliance on truck-laden interstate highways; and
- Integration of the best safety practices of both companies throughout the Canadian and U.S. transportation systems.

"Employees will benefit from being part of a stronger company in a consolidating industry. We expect the combined companies' ability to stimulate revenue growth will create exciting new employment opportunities. We are delighted to welcome IC's talented employees into the CN family. We look forward to having Hunter Harrison join CN as soon as possible," concluded Mr. Tellier.

Gilbert Lamphere, Chairman of the Board of Directors of IC, said, "This is a great opportunity for our stockholders to obtain solid value for their shares while retaining the potential for upside in the combined entity. The

senior management of the combined railroad is shareholder-oriented and has a strong track record of improving operating margins while maintaining quality service for customers."

E. Hunter Harrison, President and Chief Executive Officer of IC, said, "We will have a strong, experienced team drawn from both organizations who will implement the best practices of both. Enhancing service, seizing revenue opportunities and further improving CN's operating ratio can drive increased shareholder value."

It is anticipated that the combined company's operating efficiency will improve as a result of:

- Precision train schedules which will increase yard and line capacity;
- Lower car cycle times, which will reduce rolling stock requirements and increase car availability; and
- Savings from improved asset utilization.

Mr. Harrison added, "Our management teams share a similar philosophy for growth, customer service and the bottom line. In fact, over the last several years, CN and IC have already worked successfully together to improve service. This head-start will enable the combined company to quickly realize additional service improvements.

"The management of the combined railroad is committed to keeping in place significant levels of employee share ownership and incentive plans based on industry-leading service and efficiency. We believe this will help keep the focus on exceptional performance long after the immediate benefits of combining have been achieved," added Mr. Harrison.

Mr. Tellier concluded, "We are delivering on CN's promised turnaround strategy and focusing on our customers, shareholders and employees. CN is now positioned to thrive in the North American railroad industry of the 21st century."

The number of shares to be received per IC share in the second step merger will be equal to \$39.00 divided by the average closing price of the CN common stock on the NYSE for a 20-day trading period ending two business days prior to the effective date of the merger, provided that, for purposes of the calculation, such average price will not be greater than \$64.50 or less than \$43.00 (the collar).

Goldman, Sachs & Co. and Schroders plc acted as financial advisors to CN. The Beacon Group acted as financial advisor to IC and Lehman Brothers Inc. provided a fairness opinion to IC. Goldman Sachs Credit Partners L.P. and Bank of Montreal have fully underwritten and will act as Arrangers of US\$1.8 billion of senior credit facilities to support the transaction. Davis Polk & Wardwell acted as legal advisor to CN and Harkins Cunningham provided regulatory counsel to CN. Simpson Thacher & Bartlett acted as legal advisor to IC and Oppenheimer Wolff & Donnelly provided regulatory counsel to IC.

Illinois Central Corporation is a holding company whose principal subsidiaries are the Illinois Central (ICRR), which operates a 2,600-mile freight railroad from Chicago south to the Gulf of Mexico, and the Chicago Central (CCP), which operates an 850-mile system from Chicago west through

Iowa. IC was incorporated in 1851 and its efficient North-South configuration is known as the "Main Line of Mid-America."

Canadian National is Canada's largest and North America's sixth largest freight railroad. CN's network serves all of Canada, including the key ports of Vancouver, Montreal, and Halifax, as well as Chicago and Detroit, with connections to all points in North America. In 1992, the Company launched a revitalization plan, investing in the industry's most advanced management information system and opening the St. Clair Tunnel, which established the fastest route between Eastern Canada and the U.S. heartland. Since privatization in 1995, CN has delivered steadily improving financial performance and customer service since its initial public offering.

For background information and maps concerning this transaction, additional information about CN and web links to the IC, visit the World Wide Web at [www.cn.ca](http://www.cn.ca).

This press release contains forward-looking statements regarding future events and the future performance of CN that involve risks and uncertainties that could cause actual results to differ materially. Those risks and uncertainties include, but are not limited to, customer demand, industry competition and regulatory developments, natural events such as severe weather, floods and earthquakes, the effects of adverse economic conditions affecting the Company's shippers, changes in fuel prices, and the ultimate outcome of shipper claims, environmental investigations or proceedings and other types of claims and litigations. We refer you to the documents that CN files from time to time with the Securities and Exchange Commission, such as the Company's Form 10-K, Form 10-Q, and Form 8-K reports, which contain additional important factors that could cause its results to differ from its current expectations and the forward-looking statements contained in this press release.

SATELLITE UPLINK FOR B-ROLL:

TUESDAY, FEBRUARY 10, 1998

7:00 PM - 7:30 PM (ET)

C-Band Galaxy 6 Transponder 17

Downlink Frequency 4040

WEDNESDAY, FEBRUARY 11, 1998

7:00 AM - 7:30 AM (ET)

C-Band Galaxy 6 Transponder 17

Downlink Frequency 4040

If you have any questions or have problems during the satellite feed, call Bret Curran at 212-627-5622.

SATELLITE VIDEO OF THE STATEMENTS BY PAUL TELLIER AND E. HUNTER HARRISON:

TUESDAY, FEBRUARY 10, 1998

5:20 PM - 5:55 PM (ET)

Anik E2 C-Band, Transponder 1B Channel 2

Video Frequency 3740 MHz, Audio Frequency 2 Channels 6.2 & 6.8

Polarization - vertical mode, position - 107.3 degrees west

2/27/2016

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